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In The

Supreme Court of the United States

October Term, 1993

INTERSTATE COMMERCE COMMISSION,

Petitioner,

v.

TRANSCON LINES, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF RESPONDENTS

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether 49 U.S.C. §§10743(b) and 11702(a)(4), which do not specifically provide that they create or authorize exceptions to the filed rate doctrine of 49 U.S.C. §§10761-62, give the Interstate Commerce Commission the right to obtain a federal court injunction that enjoins a motor common carrier from enforcing its duly filed and effective tariff rate provision that the Commission has neither suspended, rejected, nor cancelled.

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BRIEF OF RESPONDENTS

STATUTES AND REGULATIONS INVOLVED

This case involves the limited power of the Interstate Commerce Commission to regulate credit under 49 U.S.C. §10743(b) and to suspend tariff rates under 49 U.S.C. §10708, both of which derive from the Act of 1927, 44 Stat. 1446, sometimes called "the Newton amendment." The appendix to this brief contains: (1) relevant portions of the Newton amendment, (2) relevant provisions of the Interstate Commerce Act (49 U.S.C. §§10704, 10708, 10744, 10761-62, 11702, 11706, 11902-03, 11916), and (3) relevant credit and tariff regulations of the Interstate Commerce Commission (49 C.F.R. §§1312.14, 1312.19, 1312.21, 1320.1-1320.3).

COUNTERSTATEMENT OF THE CASE

The Interstate Commerce Commission ("ICC") filed this action to enjoin a motor common carrier ("Transcon") and its bankruptcy trustee ("Trustee") from collecting filed tariff rates from Transcon's former customers ("shippers"). In seeking to collect unpaid tariff charges ("undercharges") from shippers, the Trustee relied upon the filed rate doctrine of 49 U.S.C. §§10761-62 and Transcon's duly filed and effective tariffs. Those tariffs included a "loss-of-discount" provision that applied to shippers that paid tariff charges more than 90 days late.

To support enjoining the loss-of-discount provision in Transcon's tariff rate, the ICC invoked its credit regulations. The ICC had issued those regulations under §10743(b), a descendant of the 1927 Newton amendment that Congress enacted to facilitate, not to excuse, compliance with the filed rate doctrine. In violation of the filed rate doctrine, the credit regulations operate to prevent enforcement of Transcon's filed tariff rate for these reasons:

1. Transcon filed its loss-of-discount tariff with the ICC as required by the filed rate doctrine, instead of negotiating an unfiled loss-of-discount rate agreement "wholly outside" the mandatory tariff system (49 C.F.R. §1320.2(g)(3));

2. Transcon omitted to give shippers repeated actual notice of the filed loss-of-discount tariff provision (49 C.F.R. §§1320.2(g)(2)(iv), 1320.3(c)), even though the filed rate doctrine charges shippers with constructive knowledge of the filed rate;

3. Transcon failed to make a demand on shippers for payment of the filed tariff rate within a 90-day time period (49 C.F.R. §1320.2(g)(2)(iv)), even though the applicable limitations period is no less than 18 months under 49 U.S.C. §11706(a); and

4. Transcon put aggregated bills for tariff charges in a single envelope (49 C.F.R. §1320.2(g)(2)(iii)), even though the filed rate doctrine makes the carrier's billing practices irrelevant.

The ICC conceded that Transcon's filed rate under §§10761-62 included Transcon's loss-of-discount tariff provision. The ICC also conceded that the tariff provision itself complied with the Interstate Commerce Act ("Act") and all of the ICC's credit regulations. Nonetheless, the ICC complained that non-tariff conduct of Transcon and the Trustee in seeking to enforce that tariff provision violated the credit regulations. The ICC invoked its statutory authority to promulgate and enforce those credit regulations under 49 U.S.C. §§10743(b) and 11702(a)(4), even though neither provision specifically states that it creates an exception to the filed rate doctrine of §§10761-62.

Both the district court and the Ninth Circuit Court of Appeals correctly refused to enjoin enforcement of Transcon's filed rate, including the loss-of-discount tariff provision. Both courts relied upon *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) ("*Maislin*"), in which this Court determined that §§10761-62 made compliance with the filed rate doctrine "utterly central" to the administration of the Act and declined to find an exception to that doctrine absent a "specific statutory provision" or a "specific congressional intention" to create an exception to the longstanding judicial interpretation of the filed rate doctrine. *See Maislin*, 497 U.S. at 132, 135.

The Ninth Circuit explained to the ICC that its position was not supported by either *Reiter v. Cooper*, 507 U.S. ___, 122 L.Ed.2d 604 (1993) ("*Reiter*"), in which this Court permitted shippers to assert reparations claims "specifically" granted by the Act, or *Southern Pacific Trans. Co. v. Commercial Metals*, 456 U.S. 336 (1982) ("*Commercial Metals*"), in which this Court held that a carrier's violations of the ICC's credit regulations did not give a shipper a defense to its duty to pay the carrier's filed rate. Pet. App 1a-9a.[1]

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[1] "Pet. App.___" refers to pages in the appendix to the Government's Petition for a Writ of Certiorari. "Resp. App. ___" refers to pages in the appendix to Respondent's Brief in Opposition to Petition for Writ of

Following the Ninth Circuit's decision, Congress enacted the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044, which amended Title 49 to create certain specific, express exceptions to the filed rate doctrine. The Government's certiorari petition correctly concedes that the 1993 amendments, which did not amend either §10743(b) or §11702(a)(4), do not address the issue in this case. Pet. 18 n.12.

A. Transcon's Bankruptcy

Transcon was once the twelfth largest motor carrier in the United States, with annual revenues of over $200 million. Pet. App. 15a. Transcon engaged in its operations as a common and contract carrier in interstate commerce pursuant to authority issued to it by the ICC. *Id.*

On May 1, 1990, an involuntary bankruptcy petition was filed against Transcon in the U.S. Bankruptcy Court for the Central District of California. Pet. App. 15a. The bankruptcy of Transcon commenced during the period of illegal rate deregulation promoted by the ICC's "Negotiated Rates" policy. That illegal policy was invalidated by this Court in *Maislin* on June 21, 1990, the month after Transcon's bankruptcy filing.

On July 10, 1990, the bankruptcy court converted Transcon's Chapter 11 case to a Chapter 7 liquidation. Pet. App. 15a. On July 17, 1990, Leonard L. Gumport was appointed Chapter 7 trustee of the Transcon bankruptcy estate. *Id.*

On August 23, 1990, the Trustee obtained authority from the bankruptcy court to employ a rate auditor, a collection agency, and collection attorneys for the purpose of collecting freight undercharges owed Transcon under the filed rate doctrine, 49 U.S.C. §§10761-62. Pet. App. 16a. The Trustee began the process of seeking to recover millions of dollars of

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Certiorari. In addition to appearing at Pet. App. 1a-43a, the two opinions of the Ninth Circuit are officially reported at 990 F.2d 1503 (9th Cir. 1992) and 9 F.3d 64 (9th Cir. 1993).

freight undercharges from shippers that formerly used Transcon[2]. *Id.*

B. Transcon's Filed Rate

The Trustee's freight undercharge recovery effort (and subsequent dispute with the ICC) involved several of Transcon's filed tariffs: (1) a freight classification tariff, (2) bureau tariffs, (3) a discount tariff, and (4) a rules tariff that contained a loss-of-discount provision. The ICC conceded, and the courts below found, that these tariffs together comprised Transcon's filed rate. *See* Pet. App. 30a, 57a-58a.

One rate, called the "bureau rate," was derived from a combination of generally applicable tariffs: the "class rate" and the "bureau tariff." *Id.* at 17a. The class rate came from the National Motor Freight Classification, filed with the ICC on behalf of Transcon and other carriers by the National Motor Freight Classification, Inc. *Id.* The class rate assigned a class to every form of shippable good. *Id.* Bureau tariffs were also filed by agents for various groups of carriers, e.g., the Rocky Mountain Tariff Bureau. *Id.* The bureau tariff determined the cost of movement between any two points in the United States for each shippable good based on its classification under the National Motor Freight Classification. *Id.*

Transcon also filed a tariff labelled TCON 625 that gave shippers discounts from the applicable bureau rate. Pet. App. 18a. In this discount tariff, Transcon identified the shipper by a code number. Transcon kept an index to the code for its own use. The index was neither filed with the ICC nor open to the public. *Id.*

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[2] *Amici* Health and Personal Care Distribution Conference, Inc., et al. represent at page three of their brief that Transcon "filed suits against over 300,000 former customers." This statistic refers to complaints that were filed, but not served, against nearly all of Transcon's former customers to toll the applicable statute of limitations while an extensive rate audit process occurred. Only a fraction of the named defendants were served. The Court may take judicial notice that fewer than 3,000 adversary proceedings are pending in the Transcon bankruptcy case.

In addition, Transcon filed a rules tariff that specified, *inter alia*, when the discounts in TCON 625 applied. Pet. App. 17a-18a. This rules tariff controlled whether a shipper had to pay the discount rate or the bureau rate. Transcon's rules tariff contained this "loss-of-discount" tariff provision:

> 1. Allowances, discounts, exception classes and commodity rates shall apply *only* when tariff charges are paid within 90 calendar days from date of shipment.
> 2. The provisions of this rule do not change the carrier's obligation to collect nor the freight charge payor's obligation to pay tariff charges within the standard credit period maintained by the carrier in compliance with ICC regulations, 49 C.F.R. 1322. This rule simply establishes a condition precedent for the application of the special tariff provisions described in paragraph 1 above.

Vol. I, Resp. C.A. Supplemental Excerpts of Record 41 (TCON 103-A, Item 210) (emphasis added); *see* Pet. App. 18a.[3] Simply put, Transcon's loss-of-discount tariff provides that a discount rate only applies when a shipper pays the discount tariff charge within 90 days from the date of shipment.

C. ICC's Credit Regulations

The ICC's credit regulations appear at 49 C.F.R. Part 1320. They include these provisions:

1. 49 C.F.R. §1320.2(g)(1)(ii) expressly authorizes a carrier to assess a collection charge for late payment by means of a loss-of-discount tariff rule. Section 1320.2(g)(1)(ii) provides that, as liquidated damages for collection costs, carriers may "by tariff rule" require "payment of the full, non-discounted rate instead of the discounted rate

[3] *Amici* Health and Personal Care Distribution Conference, Inc., et al. at page 18 of their brief mistakenly omit the word "only" from their quotation of ¶1 of Transcon's loss-of-discount tariff provision.

otherwise applicable." Also, §1320.2(f) expressly authorizes a carrier, by adoption of a loss-of-discount tariff rule, to condition a discount on early payment: "Carriers may, by tariff rule, authorize discounts for early freight bill payments when credit is extended."

2. 49 C.F.R. §1320.2(g)(3) authorizes a carrier to assess loss-of-discount collection charges "wholly outside of its tariff" through "contract terms in a bill of lading."[4]

3. 49 C.F.R. §1320.3(c) requires a carrier that extends credit to warn the shipper in the "bills or other notice" of "any applicable service charge and/or collection expense charge and discount terms."

4. 49 C.F.R. §1320.2(g)(2)(vi) provides that a carrier can assess a loss-of-discount "only after the authorized credit period, and when the carrier has issued a revised freight bill or notice of imposition of collection expense charges for late payment within 90 days after expiration of the authorized credit period."[5]

5. 49 C.F.R. §1320.2(g)(2)(iii) provides that collection costs shall be applied "only to the non-payment of original, separate and independent freight bills and shall not apply to aggregate balance due claims sought for collection on past

[4] The ICC told the Ninth Circuit that the Trustee could not rely upon 49 C.F.R. §1320.2(g)(3), even though Transcon's bill of lading incorporated by reference Transcon's tariffs. The ICC explained that §1320.2(g)(3) only authorized assessment of a loss-of-discount term by means of a bill of lading if the carrier did *not* file a loss-of-discount tariff. *See infra* part III.B, p. 24 n.11.

[5] 49 C.F.R. §1320.2(b) specifies that a carrier's "credit period" begins on the day following the carrier's presentation of the freight bill to the shipper. 49 C.F.R. §1320.3 requires a carrier generally to present its freight bill to the shipper within seven days after the carrier receives the shipment. 49 C.F.R. §1320.2(c)-(d) provide that a carrier's credit period is fifteen days, unless the carrier establishes a longer period of up to thirty days by tariff rule. 49 C.F.R. §1320.2(g)(1)(ii) provides that a carrier's loss of discount tariff may not be set to impose a loss of discount sooner than "after the expiration of the carrier's authorized credit period."

shipments by a bankruptcy trustee, or any other person or agent[.]"[6]

D. Judgment of District Court

On September 17, 1991, the ICC filed an action against Transcon and the Trustee in the U.S. District Court for the Central District of California. Pet. App. 16a, 25a. The ICC alleged that the Trustee's collection efforts violated various provisions of the ICC's credit regulations, 49 C.F.R. §§1320.2-3. Pet. App. 16a.[7]

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[6] These credit regulations are the culmination of a series of amendments that began in 1985, when the ICC promoted deregulation, flexibility, and free competition. *See Ex. Parte No. MC-1: Payment of Rates and Charges of Motor Carriers*, 133 M.C.C. 428, 431 (1985) ("additional competition stemming from credit flexibility clearly is warranted"). The ICC similarly emphasized the "new competitive atmosphere" in 1986, when the ICC adopted its Negotiated Rates policy that this Court invalidated in 1990 in *Maislin*. *See Maislin*, 497 U.S. at 121.

For subsequent amendments to the ICC's credit regulations, *see Ex Parte No. MC-1: Regulation for Payment of Rates and Charges – Penalty Charges for Nonpayment*, 4 I.C.C.2d 340 (1988); *Ex Parte No. MC-1: Regulations for Payment of Rates and Charges – Penalty Charges for Nonpayment*, 5 I.C.C.2d 691 (1989).

[7] *Amicus* Transportation Claims etc. represents at page 5 of its brief that: "The freight bills did not contain a notice about the payment period or loss of discount tariff provision" in compliance with the ICC's credit regulations. However, Transcon's standard form of freight bill did provide in capital letters that: "federal law requires payment of freight charges within 15 days." Vol. I, Resp. C.A. Supplemental Excerpts of Record 26, 43 (Barningham decl. ¶7 and Ex. 3). *See* 49 C.F.R. §1320.2(c)(specifying a 15 day credit period). In addition, the ICC did not dispute that Transcon utilized a form of bill of lading that cross-referenced Transcon's tariffs. *See infra* part III.B, pp. 24 n.11; *see also* Vol. I, Resp. C.A. Supplemental Excerpts of Record 25-26, 42 (Barningham decl. ¶7 and Ex. 2). The standard form of bill of lading states that the carrier receives the shipper's freight subject to the "classifications and tariffs in effect on the date of the issue" of the bill of lading. *See, e.g.*, ICC NMF 100-L, p. 311 (standard short form bill of lading filed with ICC); *Commercial Metals*, 456 U.S. at 342 ("The bill of lading is the basic transportation contract between the shipper-consignor and the carrier").

On October 8, 1991, the Trustee answered the ICC's complaint. Among other things, the Trustee denied that the ICC's credit regulations were in accordance with the statute that authorized such regulations, 49 U.S.C. §10743(b). The Trustee also alleged that the ICC's credit regulations violated "the filed rate doctrine as set forth in *Maislin*." Pet. App. 16a-17a.

Conceding that no material facts were in dispute, both the ICC and the Trustee moved for summary judgment. Pet. App. 25a. The district court, Judge Irving Hill presiding, held a hearing on the cross-motions for summary judgment on November 25, 1991. *Id.*

During the hearing, Judge Hill noted that: (1) the "loss of discount provision seems to be a part of the filed tariff in every situation where the trustee is attempting to collect further monies[,]" and (2) the ICC's copy of the loss-of-discount tariff showed that it was filed with the ICC in 1988. Pet. App. 52a.

In response to inquiries from Judge Hill, counsel for the ICC conceded that: (1) the only relief sought by the ICC was an injunction to prevent the Trustee from enforcing Transcon's filed loss-of-discount tariff provision (Pet. App. 50a-51a), and (2) the loss-of-discount tariff provision was a part of Transcon's "filed rate" within the meaning of *Maislin* (*id.* at 57a-58a).

Judge Hill thereafter granted summary judgment for the Trustee on the basis that the ICC's credit regulations violated the filed rate doctrine of 49 U.S.C. §§10761-62 as articulated in *Maislin* by purporting to prevent enforcement of Transcon's filed loss-of-discount tariff provision. Pet. App. 56a-62a. At no time during the hearing before Judge Hill did the ICC contend that the tariff was ineffective or unlawful, or that it had been suspended or cancelled. *See id.*

E. First Decision of Ninth Circuit

The ICC appealed from the district court's summary judgment in favor of the Trustee. On April 8, 1992, the Ninth Circuit Court of Appeals heard oral argument. During this argument, the ICC's current General Counsel disavowed any contention that Transcon's loss-of-discount was in any way unlawful. Resp. App. 1a-2a.

On June 7, 1992, the Ninth Circuit filed its opinion. Pet. App. 10a. The Ninth Circuit agreed with Judge Hill that, as the ICC had conceded (*id.* at 57a-58a), Transcon's loss-of-discount tariff provision was a part of Transcon's filed rate. *Id.* at 30a. The Ninth Circuit further held that, regardless of whether the ICC's credit regulations were valid, they could not be enforced by means of an injunction "in such a way as to undercut the filed rate requirement. Then *Maislin* governs." Pet. App. 32a.[8]

Following the Ninth Circuit's judgment, the ICC issued regulations that would have precluded the Trustee from enforcing the judgment without the ICC's permission. *Ex Parte No. MC-208: Nonoperating Motor Carriers – Collection of Undercharges*, 8 I.C.C.2d 742 (1992). The bankruptcy court in the *Transcon* case promptly enjoined those regulations, *Gumport, Trustee v. I.C.C.*, 147 B.R. 770 (Bankr. C.D. Cal. 1992), and the Trustee and other carriers obtained a ruling from the Third Circuit that those regulations were invalid. *White v. United States*, 989 F.2d 643 (3rd Cir. 1993).

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[8] In upholding the Trustee's right (and duty) to enforce Transcon's filed loss-of-discount tariff provision, the Ninth Circuit commented:

> The equities here are not necessarily with the late-paying shippers. They enjoyed the extension of credit by the carrier while the carrier became insolvent. It is not unfair to make them now contribute to the payment of the carrier's unsecured creditors. But, under *Maislin*, we need not balance the equities. The filed rate is decisive. (990 F.2d at 1515.)

The Government's brief changes the word "unfair" to "fair." *Compare id.* with Pet. App. 34a.

F. Second Decision of Ninth Circuit

In a summary reconsideration order issued June 14, 1993 at the request of the ICC, this Court vacated the judgment of the Ninth Circuit and remanded for further consideration in light of the Court's recent decision in *Reiter. ICC v. Transcon Lines*, 113 S.Ct. 2955 (1993). Pet. App. 2a.

On remand, the Ninth Circuit again affirmed the summary judgment in favor of the Trustee on his right to collect Transcon's filed rate notwithstanding the ICC's credit regulations. Pet. App. 1a. The Ninth Circuit rejected the ICC's contention that either *Reiter* or *Commercial Metals* stands for the proposition that the ICC can enforce credit regulations by means of an injunction that would operate to override the filed rate doctrine. Pet. App. 4a-5a. The Ninth Circuit emphasized that its holding left the ICC with broad power to enforce its credit regulations. *Id.* at 7a.

G. Negotiated Rates Act of 1993

During 1993, concurrently with the ICC's attempt to overturn the first decision of the Ninth Circuit, the ICC sought legislative relief from Congress, which was then considering a bill that ultimately became the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044. On June 15, 1993, the ICC requested the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation to amend 49 U.S.C. §10743(b) to give the ICC explicit power to issue credit regulations that override the filed rate doctrine. This lobbying effort failed. *See infra* part XI, pp. 47-48. As enacted by Congress and signed into law by the President on December 3, 1993, the Negotiated Rates Act left §§10743 and 11702(a)(4) intact, while amending other provisions of Title 49 to give shippers certain limited, express protections against filed rate claims.

H. Government's Certiorari Petition

In February 1994, the Government filed a petition for certiorari, and requested summary reversal of the judgment of

the Ninth Circuit. Pet. 19. The Government argued that the Ninth Circuit had misinterpreted *Maislin*, *Reiter*, and *Commercial Metals* in holding that the filed rate doctrine precluded the injunctive relief sought by the ICC. The Government's petition conceded that the Negotiated Rates Act of 1993 did not address the issue of the ICC's power under §§10743(b) and 11702(a)(4) to obtain an injunction enforcing its credit regulation so as to prevent a carrier from collecting its filed rate. Pet. 18 n.12. On April 18, 1994, the Court granted the Government's petition, but did not order summary reversal.

SUMMARY OF ARGUMENT

The district court and the Ninth Circuit correctly denied the ICC's request for an injunction. Both the credit regulations and the injunction sought by the ICC violate the filed rate doctrine of §§10761-62 as interpreted by this Court in *Maislin*, *Commercial Metals*, *Reiter*, and other decisions. The ICC is mistaken in its view that the general provisions of §§10743(b) and 11702(a)(4) are exceptions to the "utterly central" filed rate doctrine of §§10761-62. *Maislin*, 497 U.S. at 132. The ICC's position is inconsistent with the filed rate doctrine as interpreted by this Court, and with the language and legislative history of the Act.

In violation of the filed rate doctrine, the injunction would preclude enforcement of an effective (i.e., unexpired), applicable tariff rate that the ICC has never suspended, rejected, nor cancelled. In violation of the filed rate doctrine, the credit regulations, as interpreted by the ICC, prevent a carrier from collecting its duly filed and effective tariff rate should the carrier fail to give the shipper repeated actual notice of the filed rate and bill the shipper in accordance with the ICC's billing requirements. The credit regulations create, as a defense to enforcement of the filed tariff rate, the carrier's error in failing to enforce the filed rate within a time period far shorter than the applicable statute of limitations. The credit regulations also create, as a defense to enforcement of the filed rate, the shipper's failure to receive actual written

notice of the filed rate, even though the shipper is deemed to have constructive knowledge of the filed rate. In precluding Transcon from enforcing its loss-of-discount tariff provision because it was filed, while permitting unfiled, secret loss-of discount arrangements to be enforced free of the technical requirements of the credit regulations, the regulations effectively punish carriers for filing their rates.

Under *Maislin*, the filed rate doctrine of §§10761-62 is "utterly central" to the Act. *Maislin*, 497 U.S. at 132. For this reason, other provisions of the Act will not be interpreted to create an exception to the longstanding judicial interpretation of the filed rate doctrine absent a "specific statutory provision" or a "specific congressional intention" reflecting the existence of such an exception. *Id.* at 135. The Court's decision in *Reiter* adheres to this principle, in that *Reiter* only permitted shippers to assert reparations claims "specifically" provided for in the Act. *Reiter*, 122 L.Ed.2d at 616. Neither the language nor legislative history of §§10743(b) and 11702(a)(4) has the specificity required by *Maislin* to create an exception to the filed rate doctrine.

Both §§10743(b) and 11702(a)(4) are devoid of language that specifies that they create exceptions to the filed rate doctrine of §§10761-62. Instead, the language of those provisions shows that Congress did not intend that they would create exceptions to the filed rate doctrine. The only specific authority that §10743(b) gives the ICC is to permit weekly or monthly payment, and §10743(b) specifically requires that such regulations be aimed at "preventing discrimination . . . ." *Maislin* reaffirmed that strict adherence to the filed rate doctrine is necessary to prevent price discrimination and ensure the reasonableness of rates. Further, in specifically precluding the ICC from seeking an injunction to enforce any provision of the Act "governing the reasonableness and discriminatory character of the rates," §11702(a)(4) reflects the intent of Congress to preclude the ICC from seeking to enjoin a tariff rate unless the ICC first takes action, as required by the filed rate doctrine, to suspend, reject, or cancel the tariff.

The ICC's view of §§10743(b) and 11702(a)(4) also conflicts with the legislative history of the Act. Section

10743(b) derives from the Newton amendment of 1927, which Congress enacted to facilitate, not to excuse, compliance with the filed rate doctrine. Congress permitted carriers to extend credit so that carriers and shippers would have time in which to examine tariffs on file with the ICC to lessen the risk of subsequent claims for undercharges or overcharges. Further, in *Arrow Transp. Co. v. Southern R. Co.*, 372 U.S. 658 (1963) ("*Arrow*"), this Court previously determined that the Newton amendment and its predecessors withdrew from federal courts the power to enjoin rates that the ICC has not suspended.

The ICC's reliance on *Commercial Metals* is mistaken. That decision, and the Seventh Circuit precedent cited with approval in that decision, confirm that the ICC's credit regulations are subject to the requirements of the filed rate doctrine of §§10761-62.

The ICC's argument that it "could" strike Transcon's loss-of-discount tariff provision is irrelevant and mistaken. First, a filed rate is enforceable even if it is technically defective or unreasonable. Second, this argument implicitly concedes that the ICC has not stricken or suspended the tariff provision, so that it remains effective. Third, mere rejection of that tariff provision would not excuse compliance with the filed rate doctrine for transportation services rendered by Transcon prior to the date of rejection, absent retroactive rejection of the tariff provision. Fourth, the ICC cannot meet (and has not sought to meet) the stringent requirements for retroactive rejection set by *ICC v. American Trucking Associations, Inc.*, 467 U.S. 354 (1984) ("*ATA*").

Although the ICC's exercise of its powers under §§10743(b) and 11702(a)(4) remains subject to the requirements of the filed rate doctrine of §§10761-62, the ICC retains broad authority to regulate credit and to obtain injunctions, so long as the ICC does not violate the filed rate doctrine. The Trustee's filed rate claims remain subject to reparations counterclaims by shippers under *Reiter*.

Finally, the ICC's certiorari petition concedes that the Negotiated Rates Act of 1993 does not decide the issue before this Court, so that the effect of that 1993 legislation is not presented to this Court for review. Further, that legislation did

not amend either §10743(b) or §11702(a)(4), and Congress declined to add language to §10743(b) proposed by the ICC to support its incorrect interpretation of that provision. The language of the 1993 amendments shows that Congress uses specific language when it wants to create an exception to the filed rate doctrine.

ARGUMENT

I. THIS CASE PRESENTS THE NARROW ISSUE OF WHETHER THE ICC MAY UTILIZE ITS CREDIT REGULATIONS TO PREVENT ENFORCEMENT OF A CARRIER'S DULY FILED RATE

A. The ICC Seeks To Enjoin Enforcement of Transcon's Duly Filed Rate

This case presents only the narrow issue of whether the ICC may use its general authority to regulate the extension of credit under §10743(b) and to obtain injunctions under §11702(a)(4) as a basis to prevent enforcement of a motor common carrier's duly filed rate under §§10761-62. Both the district court and the court of appeals correctly answered that question in the negative, and found that *Maislin* compels the conclusion that §§10761-62 controls. The ICC's general authority under §§10743(b) and 11702(a)(4) cannot be interpreted as urged by the ICC without subordinating the primacy of the "utterly central" filed rate provisions of §§10761-62. *Maislin*, 497 U.S. at 132, *quoting Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986); *see MCI Telecommunications Corporation v. American Telephone and Telegraph Company*, No. 93-356, 511 U.S. ___, 1994 U.S. LEXIS 4639, at *22 (1994) ("*MCI*") (*quoting Maislin* with approval).

The Trustee had no choice but to comply with the requirements of §§10761-62 to collect the funds owed to Transcon under its loss-of-discount tariff provision. *See Commercial Metals*, 456 U.S. at 343 ("a carrier has not only the right but also the *duty* to recover its proper charges") (emphasis added). The ICC recognized this duty in its 1988

decision that authorized carriers to utilize the loss-of-discount tariff method for the recovery of collection costs:

> Under a tariff-rule method of recoupment, at the expiration of the grace period, a carrier *must* affirmatively seek the collection-charge damages due it as provided in the tariff. A carrier has no discretion after the charges become due to waive them or any portion of them. To do so would violate the "filed rate" doctrine applicable to its tariff and unjustly discriminate between other shippers and/or consignees who do not have such fees waived.

Ex Parte No. MC-1: Regulations for Payment of Rates and Charges – Penalty Charges for Nonpayment, 4 I.C.C.2d 340, 346-47 (1988) (emphasis in original). Yet the record below confirms that the ICC's only goal in seeking its injunction was to prevent the Trustee from performing his duty to enforce Transcon's filed rate. At the summary judgment hearing in the district court, the ICC's counsel Mr. Day confirmed this fact:

> THE COURT: . . . . The judgment sought by the plaintiff I.C.C. in this case – the judgment that will be granted if they win today – is a judgment to prevent the trustee from attempting to collect such additional sums by enforcement of the loss of discount provision of the filed rates.
>
> Plaintiff's case is limited to that attempt and the relief sought, the injunction, would be limited to that practice and that collection effort; right?
>
> MR. DAY: Yes, [y]our Honor, that is correct. (Pet. App. 50a.)

During that same important hearing, the ICC also conceded that Transcon's filed loss-of-discount tariff provision was a part of Transcon's "filed rate" within the meaning of the filed rate doctrine as set forth in *Maislin*:

> THE COURT: . . . . For purposes of interpreting *Maislin* and determining what the "filed rate" is, as the term is used in the filed-rate doctrine, I believe that the defendant trustee here is correct as

> it defines that term. Defendant defines the term "filed rate" to include *all* of Transcon's tariffs, including class rates, bureau rates, rules tariffs, and discount rates.
>
> Now, I would like to hear from you, Mr. Day [ICC counsel], whether you take issue with that definition of the term "filed rate."
>
> MR. DAY: Your honor –
>
> THE COURT: Just that question.
>
> MR. DAY: Just that question. No, *I don't take issue with that at all.* (Pet. App. 57a-58a (emphasis added).)

The ICC had to concede this point for several reasons: (1) as the district court noted, the ICC's files reflect that Transcon had filed its loss-of-discount tariff provision with the ICC (Pet. App. 52a); (2) the ICC has not suspended[9] that tariff provision (Govt. Brief 25 n.20); (3) the ICC's credit regulations expressly authorize a loss-of-discount tariff (49 C.F.R. §1320.2(g)(1)(ii)); and (4) in specifying that discounts "*only*" apply when "tariff charges" are paid within 90 days of shipment, Transcon's loss-of-discount tariff unambiguously provides the filed rate that applies to shippers that fail to pay Transcon's discount rates in TCON 625 within 90 days of shipment. *See supra* part B, pp. 5-6.

Because 49 C.F.R. §1320.2(g)(1)(ii) expressly authorizes a loss-of-discount tariff provision, the ICC also had to concede that Transcon's loss-of-discount tariff provision was facially valid. *See infra* part VII, pp. 39-41. The current General Counsel of the ICC conceded this point during argument before the Ninth Circuit Court of Appeals:

> THE COURT: Right. And you say, is it your contention then that the tariff did violate the regulation requiring notice in effect in the bill of lading.

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[9] The ICC files a written supplement to an otherwise effective tariff in order to suspend or cancel it. 49 C.F.R. §§1312.19, 1312.21.

> MR. RUSH: No. *We don't contend the tariff violated anything.* We contend that the tariff was one of four things that had to be done in order to be released from the obligation to charge no more than the discounted rate. (Resp. App. 2a (emphasis added).)

B. The Loss-of-Discount Tariff Provision Did Not State That It Would Apply Only If Transcon Complied with the ICC's Credit Regulations

In an attempt to avoid the necessary result under *Maislin* of a conflict between the utterly central filed rate doctrine, on the one hand, and, on the other, any of the general provisions of Title 49, *amici* Health and Personal Care Distribution Conference, Inc., et al. argue that Transcon's loss-of-discount tariff provision has a meaning not attributed to it by either the ICC or the Trustee. According to these *amici*, the loss-of-discount tariff should be read to deprive shippers of their discounted rates only if Transcon complies with all of the ICC's credit regulations, *even if* the shippers failed to pay their discounted tariff rates within 90 days of shipment.

These *amici* make this argument by deleting (without an ellipsis to show the deletion) the word "only" from ¶1 of Transcon's loss-of-discount tariff provision. *See* Brief of the Health and Personal Care etc., et al., at 18. Paragraph 1 of Transcon's loss-of-discount tariff provision states that "discounts . . . shall apply *only* when tariff charges are paid within 90 calendar days from date of shipment." *See supra* part B, p. 6 (emphasis added). This language cannot reasonably be construed to mean that "discounts shall apply sometimes when tariff charges are not paid within 90 days, namely, when the carrier fails to comply with the ICC's credit regulations."

II. UNDER *MAISLIN*, THE FILED RATE DOCTRINE OF §§10761-62 REQUIRES THE CARRIER AND THE SHIPPER TO ADHERE TO THE DULY FILED TARIFF RATE UNLESS AND UNTIL THE ICC SUSPENDS, REJECTS, OR CANCELS THE TARIFF

The statutory duties of a motor common carrier under §§10761-62 to file its rates with the ICC and to adhere to those rates, together with the statutory prohibition against discrimination in §10741, "create strict filed rate requirements and . . . forbid equitable defenses to collection of the filed tariff." *Maislin*, 497 U.S. at 126-27. *Maislin* quoted with approval this "classic statement" of the filed rate doctrine:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

Maislin, 497 U.S. at 127, *quoting Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915)[10]. *Maislin* also quoted with approval this statement of the filed rate doctrine:

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[10] *Maislin* noted that various commercial services provide "up-to-the-minute details of the carrier's rate schedule." 497 U.S. at 131 n.12. Given the existence of such tariff information services, the rule that shippers moving their freight are presumed to know the filed tariff rate is no harsher than the rule that citizens are presumed to know the law. *See North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925) ("All persons are charged with knowledge of the provisions of statutes"). In responding to the ICC's contention that "no one reads the tariffs," the Ninth Circuit observed: "If a shipper doesn't read the tariff, would the shipper read the regulations?" Pet. App. 33a.

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier . . . .

Maislin, 497 U.S. at 126, *quoting Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 163 (1922). The Court in *Maislin* also stated that, under the filed rate doctrine, "[n]or could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor[.]" *Maislin*, 497 U.S. at 127 n.9, *quoting Louisville & Nashville R. Co. v. Central Iron & Coal Co.*, 265 U.S. 59, 65 (1924).

In *Maislin*, the Court invalidated the "Negotiated Rates" policy that the ICC had adopted pursuant to the broad and apparently unqualified requirement of §10701(a) of the Act that a carrier's "practice related to transportation . . . be reasonable." Under the Negotiated Rates policy, the ICC relied upon §10701(a) to justify deciding on a case by case basis whether it would be an "unreasonable practice" for a carrier to assert a filed rate claim against a shipper who had paid a negotiated, rather than a filed, rate. *Maislin* held that the ICC's attempt to utilize the seemingly unqualified terms of §10701(a) in this manner violated the filed rate requirements of the Act:

> Compliance with §§10761 and 10762 is "*utterly central*" to the administration of the Act. *Regular Common Carrier Conference v. United States*, 253 US App DC 305, 308, 793 F2d 376, 379 (1986). . . . Although the ICC argues that the Negotiated Rates policy does not "abolis[h] the requirement in section 10761 that carriers must continue to charge the tariff rate," App to Pet for Cert 36a, the policy, by sanctioning adherence to unfiled rates, undermines the basic structure of the Act. The ICC cannot review in advance the reasonableness of *unfiled* rates. Likewise, other shippers cannot know if they

> should challenge a carrier's rates as discriminatory when many of the carrier's rates are privately negotiated and never disclosed to the ICC. (*Maislin*, 497 U.S. at 132-33 (emphasis added).)

III. THE CREDIT REGULATIONS AND THE INJUNCTION SOUGHT BY THE ICC VIOLATE THE FILED RATE DOCTRINE OF §§10761-62 AS INTERPRETED BY *MAISLIN*

A. Transcon's Filed Rate Included Its Loss-of-Discount Tariff Provision

At the summary judgment hearing in the district court, the ICC conceded that Transcon's loss-of-discount tariff provision was a part of Transcon's filed rate within the meaning of *Maislin*. *See supra* part I.A, pp. 16-17. The ICC further conceded that Transcon's loss-of-discount provision was lawful. *Id.* at 17-18; *see also infra* part VII, p. 39 (tariff is enforceable even if technically defective or unreasonable). The Ninth Circuit summarized how the loss-of-discount provision formed a part of Transcon's filed rate:

> . . . . Transcon had on file with the ICC the bureau rate setting out its full charges; its discount rate; and the rules tariff providing that the discounts applied to charges that were paid within 90 days of the date of shipment. Together these filings constituted Transcon's filed rate. None of the filed rates incorporated all the conditions set by the ICC for the extension of credit.
>
> The application of Transcon's filed rate leads (1) to the grant of discounts subject to a condition; (2) to the loss of the discounts when the condition is not met, i.e., payment is not made in 90 days; with the result (3) that the bureau rate governs. (Pet. App. 30a.)

B. By Preventing Enforcement of Transcon's Filed Rate, the Credit Regulations and Injunction Sought by the ICC Violate the Filed Rate Doctrine

The ICC conceded that, based on its credit regulations, it sought an injunction that would prevent enforcement of the loss-of-discount tariff provision in Transcon's filed rate. *See supra* part I.A, pp. 16-17. Both the credit regulations and the injunction sought by the ICC would violate four separate rules embodied in the filed rate doctrine of §§10761-62.

First, the credit regulations conflict with the rule of the filed rate doctrine that makes ignorance or misquotation of rates irrelevant to the duty of the carrier and shipper to adhere to the carrier's filed tariff rate. *Maislin*, 497 U.S. at 126-28. In violation of this rule, the credit regulations, in the ICC's view, make the carrier's misquotation of the loss-of-discount tariff provision, or the shipper's lack of notice of that tariff provision, a defense to its enforcement. For example, 49 C.F.R. §1320.3(c) requires the carrier's "bills or other notice" to state the "discount terms." Also, §1320.2(g)(2)(vi) requires the carrier to send the shipper a second notice of the tariff provision, in the form of a "revised freight bill or notice," within 90 days after expiration of the carrier's credit period. Lastly, §1320.2(g)(2)(iv) precludes application of the tariff provision when the late payment results from "clerical or ministerial error."

Second, the credit regulations conflict with the rule of the filed rate doctrine that no act or omission of the carrier (except the running of the statute of limitations) can estop or preclude the carrier from enforcing payment of the filed rate. *Maislin*, 497 U.S. at 127 n.9. In violation of this rule, the credit regulations make the carrier's failure to send bills in separate envelopes, or in a timely manner, a defense to payment of the rate specified in Transcon's loss-of-discount tariff. *See* 49 C.F.R. §§1320.2(g)(2)(iii), 1320.2(g)(2)(vi), 1320.3(c). Further, §1320.2(g)(2)(vi) requires the carrier to send a second bill within 90 days after expiration of the credit period as a condition to collecting the loss-of-discount

tariff charge, but the statute of limitations for filed rate claims for freight transported prior to December 3, 1993 is three years under 49 U.S.C. §11706(a), and no less than 18 months for freight transported thereafter (*id.*). The Ninth Circuit described how the credit regulations operate to permit the carrier's acts and omissions to circumvent compliance with the filed rate doctrine:

> A carrier and shipper could privately negotiate a discount from the filed rate. The carrier would purposely violate various credit regulations such as 49 C.F.R. 1320.3(c), which requires the original bill to the shipper to carry a notice of the penalty for late payments. If the ICC goes along, then the filed rate doctrine would be gutted. Neither the carrier nor the shipper would protest the arrangement that they themselves have negotiated. If the ICC looks the other way, only after a carrier goes bankrupt would the illegal discount be brought to light. But because the carrier intentionally failed to give notice to the shipper, the ICC would have the power to enjoin the trustee's suit to enforce the filed rate, and the trustee would have no power to undo the illegal bargain struck by the carrier and the shipper. (Pet. App. 6a.)

Third, the credit regulations conflict with the rule of the filed rate doctrine that the ICC does not have the power to adopt a policy that, "by sanctioning adherence to unfiled rates, undermines the basic structure of the Act." *Maislin*, 429 U.S. at 132. In violation of this rule, the credit regulations sanctify secret, unfiled loss-of-discount arrangements, and punish such carriers as Transcon that file their loss-of-discount tariffs. Specifically, 49 C.F.R. §1320.2(g)(3) permits a carrier to opt out of all of the complex requirements of the ICC's credit regulations if the carrier assesses collection charges "*wholly outside* of its tariff . . . [through] contract

terms in a bill of lading." *Id.* (emphasis added)[11]. Under §1320.2(g)(3), Transcon would have the right to collect its loss-of-discount tariff rate if Transcon *refrained* from filing its loss-of-discount tariff provision with the ICC. The regulations punish Transcon for filing its loss-of-discount tariff provision by precluding enforcement of that tariff provision, merely because Transcon and its Trustee did not comply with the complex multiple notice rule and short limitations period of §§1320.2-3 that do *not* apply to non-filing carriers. Credit regulations that prevent common carriers from collecting their duly filed and effective rates, but permit these same carriers to privately contract with shippers and to make secret and unsupervised collection charges do not further §10743(b)'s mandate that the regulations "prevent[ ] discrimination," since the duty to file and adhere to filed tariff rates has always been considered "essential" to prevent discrimination. *Maislin*, 497 U.S. at 126.

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[11] The ICC's March 6, 1992 reply brief, at 4-5, represented to the Ninth Circuit that Transcon failed to comply with the requirement of 49 C.F.R. §1320.2(g)(3) as follows:

> Finally, the Trustee disingenuously suggests (Br. at 46-48) that the reference in Transcon's bills of lading to its tariffs (which in turn contained the loss-of-discount provision) brought Transcon within an alternate part of the ICC's credit regulations. The credit regulations require a carrier to choose between two mutually exclusive methods to recoup collection costs from shippers who do not pay their freight charges. One method is to assess liquidated damages (through published tariff rules), under either 49 CFR 1320.2(g)(1)(i) or (ii); the other approach is to recover collection costs by a separate contract reflected in the bill of lading, under 49 CFR 1320.2(g)(iii). Transcon clearly chose the tariff approach (see Trustee's Br. at 11-12, 18), and the Trustee cannot alter that now. In any event, a mere reference to the tarif n the bill of lading, coupled with an acknowledgment of the shipper that it is familiar with the terms of the tariff, is not sufficient to bring into being a separate contract in the bill of lading under 49 CFR 1320.2(g)(iii).

Fourth, the relief sought by the ICC violates the rule of the filed rate doctrine that the filed tariff rate is the binding legal rate, "[u]nless and until suspended or set aside" by the ICC. *Maislin*, 497 U.S. at 126, *quoting Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 163 (1922). In violation of this rule, the federal court injunction sought by the ICC would preclude enforcement of Transcon's filed tariff rate even though the ICC concededly never suspended or set aside that tariff rate. The ICC's brief implicitly concedes that the tariff remains in effect by stating that the "ICC *could* strike the tariff from its files . . . . " Govt. Brief 25 n.20 (emphasis added). The ICC's statement that it "could" strike the tariff necessarily implies that: (1) the ICC has not struck the tariff, and that (2) the ICC's credit regulations do not have the effect of suspending or cancelling Transcon's loss-of-discount tariff[12].

The provisions of 49 U.S.C. §11916 confirm that the ICC's credit regulations conflict with the filed rate doctrine. Under §11916, Transcon's loss-of-discount tariff provision would be "conclusive proof" in any enforcement proceeding arising from Transcon's failure to collect its filed rate under §§10761-62 and 11902-03. But the ICC, under its credit regulations, wants to take the position that Transcon has a legal duty to refrain from collecting that filed rate. Thus, if Transcon performs its legal duty under the filed rate doctrine in order to avoid liability under 49 U.S.C. §§11903 and 11916, then Transcon violates the ICC's credit regulations. If Transcon complies with the ICC's credit regulations by refraining from enforcing Transcon's filed rate, then Transcon violates the filed rate provisions of §§10761-62 and incurs liability under §§11903 and 11916.

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[12] The ICC is mistaken in alleging that it "could" strike the loss-of-discount tariff provision. *See infra* part VII, pp. 39-41.

IV. THE ICC'S PROPOSED INTERPRETATION OF §§10743(b) AND 11702(a)(4) IS INCONSISTENT WITH THE LANGUAGE AND STRUCTURE OF THE ACT

A. To Create an Exception to the "Utterly Central" Filed Rate Doctrine of §§10761-62, Congress Must Express a Specific Intention To Do So

In *Maislin*, the Court declined to find that the ICC's general authority to regulate an "unreasonable practice" under §10701(a) created an implied exception to the filed rate provisions of §§10761-62. In reaching that conclusion, the Court noted that the shipper "pointed to no *specific* statutory provision or legislative history indicating a *specific* congressional intention to overturn the longstanding" judicial interpretation of the Act. *Maislin*, 497 U.S. at 135, *quoting Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 420 (1986) (emphasis added). *Maislin* illustrated this point by noting that §10735 provides a specific exception to the filed rate doctrine for household goods carriers:

> This exception for household goods carriers also demonstrates that Congress is aware of, but has elected not to eliminate as applied to other motor common carriers, the general requirements of §§10761 and 10762. (*Maislin*, 497 U.S. at 135 n.15.)

Another example of a specific exception in the Act to the filed rate doctrine appears in §10744. It expressly relieves certain consignees (but not consignors, shippers, or beneficial owners of the freight) of liability for filed rate claims that arise after delivery of the shipment:

> . . . . When the shipper or consignor instructs the carrier transporting the property to deliver it to a consignee that is an agent only, not having beneficial title to the property, the consignee is liable for rates billed at the time of delivery for which the consignee is otherwise liable, but not for additional rates that may be found to be due after delivery . . . . (49 U.S.C. §10744(a)(1).)

The Court's post-*Maislin* decisions adhere to the principle that, to support an exception to the filed rate doctrine of §§10761-62, there must be specific statutory language or legislative history that shows a specific congressional intention to create the exception.

In 1993, in *Reiter*, the Court again stated that it agreed that the filed rate doctrine "does *not* include any 'unreasonable-rate defense,' derived from the *general* ICA requirement (now codified in §10701(a)) that a carrier's rates be 'reasonable.' " *Reiter*, 122 L.Ed.2d at 616 (emphasis added). The Court further concluded that the filed rate doctrine did not preclude shippers from avoiding the tariff note "through claims and defenses that are *specifically* accorded by the ICA itself." *Id.* at 616 (emphasis added). The Court noted that the ICC "has long interpreted [the Act] as giving it no power to decree reparations relief[,]" so that shippers must in the first instance seek reparations by means of a civil action filed in court. *Id.* at 618. Thus, *Reiter* declined to find that a "general" provision of the Act could be interpreted to create an exception to the filed rate doctrine, and instead merely held that the filed rate doctrine did not obliterate a statutory cause of action for reparations "specifically" conferred by the Act in §11705(b)(3).

In *Security Services, Inc. v. K Mart Corporation*, 511 U.S. ___, 128 L.Ed.2d 433 (1994) ("*KMart*") this Court strictly enforced the filed rate doctrine against a carrier that had no effective filed tariff rate. In *KMart*, the carrier's filed tariffs were missing an essential element. In particular, the carrier's mileage tariff listed its mileage rates, and cross-referenced another tariff, a mileage guide tariff, that specified the distances between the shipping points to which the carrier's mileage rates applied. However, the mileage guide tariff expressly provided that it only applied to participating carriers specifically named in a supplement to the mileage guide tariff. That supplement did not include the name of the carrier. As a result, the carrier had mileage rates, but no distances from which the tariff charge could be computed. Since the carrier's tariffs were incomplete on their face, the carrier had no filed rate to enforce. Because the carrier had no

effective filed rate, the Court upheld the ICC's void-for-nonparticipation regulations that provided that, in such circumstances, the carrier had no effective tariff rate. In effect, the ICC's void-for-nonparticipation regulations merely restated the result dictated by the filed rate doctrine: a fundamentally incomplete filed rate is ineffective and void.

Most recently, in *MCI*, the Court invalidated the FCC's attempt to limit the tariff filing requirements of non-dominant communications common carriers under 47 U.S.C. §203, even though §203 gave the FCC general, but not specific, authority "to modify" the filed rate doctrine. Like 49 U.S.C. §§10761-62, 47 U.S.C. §203 "establishes a rate-regulation, filed-tariff system for common carrier communications[.]" *MCI*, 1994 U.S. LEXIS 4639 at *28-29. Describing the FCC as an "analog" of the ICC, the Court referred to the tariff-filing requirement as "the heart of the common carrier section of the Communications Act." *Id.* at *34.

Neither §10743(b) nor §11702(a)(4) specifically provides that it creates an exception to the filed rate provisions of §§10761-62. Under *Maislin*, *Reiter*, and *MCI*, the absence of such specific language precludes interpreting those general provisions to create exceptions to the filed rate doctrine. As described below, the language that does appear in §§10743(b) and 11702(a)(4) shows that they do not create exceptions to the filed rate doctrine.

B. The Language of §10743(b) Does Not Reflect a Specific Congressional Intention to Create an Exception to the Filed Rate Doctrine of §§10761-62

The language of §10743(b) shows that it does not create an exception to the filed rate doctrine. The only type of credit regulation that §10743(b) expressly authorizes is one that provides "for weekly or monthly payment for transportation or service." This minor grant of authority to the ICC to authorize delays in payment hardly suggests that Congress intended §10743(b) to confer major authority on the ICC to repeal the "utterly central" requirements of §§10761-62. A

similar statutory structure led this Court to reject the FCC's contention that 47 U.S.C. §203 permits the FCC to create a broad exception to the filed rate doctrine of the Communications Act:

> [A] further indication that the §203 authority to "modify" does not contemplate fundamental changes is the sole exception to that authority which the section provides. One of the requirements of §203 is that changes to filed tariffs can be made only after 120 days notice to the Commission and the public. §203(b)(1). The *only* exception to the Commission's §203(b)(2) modification authority is as follows: "except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days." Is it conceivable that the statute is indifferent to the Commission's power to eliminate the tariff-filing requirement entirely for all except one firm in the long-distance sector, and yet strains out the gnat of extending the waiting period for tariff revision beyond 120 days? We think not. (*MCI*, 1994 U.S. LEXIS 4639, at *19 (emphasis added).)

Equally compelling is the express language of §10743(b)(1) that requires credit regulations adopted by the ICC to serve the purpose of "preventing discrimination[.]" Those terms confirm that the ICC has no authority to use its ability to regulate credit as a basis to override the requirements of the filed rate doctrine. This conclusion follows from *Maislin*:

> The duty to file rates with the Commission, see §10762, and the obligation to charge only those rates, see §10761, have always been considered essential to preventing price discrimination . . . .

Maislin, 497 U.S. at 126. Because the filed rate doctrine is "essential to preventing price discrimination" (*id.*), §10743(b)'s requirement that the credit regulations "prevent[ ] discrimination" cannot mean that the ICC has authority to

adopt regulations that eliminate the Act's "essential" means of preventing discrimination.

C. The Language of §11702(a)(4) Does Not Reflect a Specific Congressional Intention to Create an Exception to the Filed Rate Doctrine of §§10761-62

Section 11702(a)(4) expressly provides that the right of the ICC to obtain an injunction under that provision does *not* extend to an action "under a provision of this subtitle governing the reasonableness and discriminatory character of rates[.]" This exception in §11702(a)(4) reflects that the Act contemplates that federal courts shall *not* enjoin tariff rates that the ICC has neither suspended, rejected, nor cancelled.

The Act contemplates that the ICC, not federal courts, will supervise tariff rates by suspending them under §10708, rejecting them under §10762(e), or ordering the old rate cancelled and prescribing the new rate to be followed under §10704(b)(1). "A primary responsibility of the [ICC] is to supervise and approve tariffs submitted under the [Act]." *ATA*, 467 U.S. at 367. Under 49 U.S.C. §10762(e), the ICC "is expressly empowered to reject tariffs prior to their effective date." *Id.* Under 49 U.S.C. §10708, the ICC's "power to suspend is limited to the seven months after the proposed tariff's effective date, and final action in a suspension-investigation proceeding can be taken only after a full hearing." *ATA*, 467 U.S. at 363-64. After the expiration of the seven month suspension period, unless the ICC has taken final action to suspend the rate, the tariff becomes effective, subject to the shipper's right to receive reparations under 49 U.S.C. §11705(b)(3) in the event the ICC ultimately determines the rate to be unlawful. Unless and until the effective tariff rate is set aside by the ICC through formal administrative proceedings, a federal court has no power to enjoin enforcement of the rate. *See Arrow*, 372 U.S. at 665 ("Congress was aware . . . that some shippers might for a time have to pay unlawful rates because a [suspension] proceeding might not be concluded and an order made within the reduced

time"). In "narrow circumstances" the ICC, not a court, can retroactively reject an effective tariff after the suspension period. *See ATA*, 467 U.S. at 365; *Arrow*, 372 U.S. at 667 (Act's vesting of tariff suspension power in ICC reflects intent of Congress "to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief"); *Burlington Northern, Inc. v. United States*, 459 U.S. 131, 139 (1982) ("*Burlington Northern*") ("we emphasized [in *Arrow*] that court-ordered injunctions were inconsistent with the congressional intent to vest ratemaking decisions in the Commission").

In summary, the ICC's interpretation of the exception clause of §11702(a)(4) undermines the structure of the Act by shifting to federal courts the ICC's responsibility for the supervision of tariffs.

V. THE ICC'S PROPOSED INTERPRETATION OF §§10743(b) AND 11702(a)(4) IS INCONSISTENT WITH THE LEGISLATIVE HISTORY OF THE ACT

A. The Legislative History of §10743(b) Confirms That It Does Not Authorize the ICC To Create an Exception to the Filed Rate Doctrine of §§10761-62

The legislative history of §10743(b) confirms that Congress gave the ICC power to regulate credit in order to facilitate, not to excuse, compliance with the filed rate doctrine.

The statutory ancestor of §10743(b) is the Act of 1927, 44 Stat. 1446, called the "Newton amendment" after Representative Newton, the member of the House Committee on Interstate and Foreign Commerce who sponsored the bills that resulted in the 1927 legislation that enlarged the ICC's power to regulate credit. *See Ex Parte No. MC-1: Payment of Rates and Charges of Motor Carriers*, 2 M.C.C. 365, 375 (1937) (referring to the "Newton amendment"); H. R. Rep. No. 1214, 69th Cong., 1st. Sess. (1926); 47 Cong.Rec. 12755-57 (1926); S. Rep. No. 1508, 69th Cong., 2d Sess. (1927); H. R. Rep. No.

2282, 69th Cong., 2d Sess. (1927). The Newton amendment amended the Act to provide:

> No carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination . . . .

44 Stat. at 1447. In substantially similar form, with the addition of the words "including rules and regulations for weekly and monthly settlement," the Newton amendment became §223 of the Motor Carrier Act of 1935, Pub. L. No. 74-255, 49 Stat. 543, 565-66. In 1978, Congress recodified that provision as current §10743(b), changing the word "settlement" to "payment," but expressly providing that the recodification did not alter the meaning of the statutory terms. 92 Stat. 1337, 1391, 1466.

The legislative history of the Newton amendment shows that Congress authorized carriers to extend credit, and the ICC to make credit regulations, in order to give carriers and shippers time to check the filed tariff rate to make certain that they were complying with it. A short time after the enactment of the Newton amendment, the ICC provided the following interpretation of it:

> . . . . The [pre-1927] statute as interpreted by us, did not authorize us to prescribe rules permitting the carriers to extend credit to shippers in order that shippers might audit their freight bills and thereby guard against claims for overcharges or undercharges. The only change in the law made by the [Newton] amendment is that now we are not restricted to making rules that assure prompt payment of freight charges. *We may permit carrier to extend credit for a reasonable time to shippers for the purpose of auditing freight bills or to meet other exigencies of business* . . . .

Ex Parte No. 73: In re Section 3 of Interstate Commerce Act as Amended February 28, 1920, and March 4, 1927, 171 I.C.C. 268, 270 (1931) (emphasis added). In sponsoring the legislation that ultimately became the Newton amendment, Representative Newton provided a nearly identical explanation:

> . . . . The provisions of existing law provide that no carrier shall deliver freight until all charges have been paid, except under such rules as the Interstate Commerce Commission shall prescribe to "assure the prompt payment" of those charges. Under these regulations "assuring prompt payment," payment must be made within about 48 or 72 hours. Many receivers of freight felt that this time is too short for this reason. *It gives practically no time in which to study the freight bills and to compare the rate charged with the rate in the carrier's established tariff so as to see whether or not any errors have been committed. As a result, there has been a demand on the part of a great many shippers for an opportunity to make weekly settlement of their freight charges. Of course, this should only be done under suitable rules and regulations. . . . By making these weekly settlements, shippers would, before payment of the charges, have time to make some investigation of the existing tariff with the idea of correcting any mistake prior to making settlement. If this were possible, it would obviate considerable expense to both carriers and shippers, growing out of the making of overcharges and undercharges.*

H. R. Rep. No. 1214, 69th Cong., 1st Sess. 2 (1926) (emphasis added); *see also* S. Rep. No. 1508, 69th Cong., 2d Sess. 2 (1927) (same explanation).

In summary, the legislative history of the Newton amendment reflects that the ICC misapprehends the purpose of its authority to regulate credit. Congress gave that authority to the ICC to permit carriers and shippers to trade on credit while they checked the filed tariffs to conform their conduct to the requirements of the filed rate doctrine. Disregarding

this clear congressional intent, the ICC's regulations, as now interpreted by the ICC, operate to prevent the carrier from performing its duty to collect the filed rate.[13]

B. The Legislative History of the Act Also Shows That Congress Did Not Intend That Federal Courts Would Enjoin Filed Tariffs That the ICC Had Neither Suspended, Rejected, nor Cancelled

The Newton amendment increased the ICC's suspension period to seven months, 44 Stat. 1447-48, in order to give the ICC more time to review the lawfulness of a proposed new tariff rate before it took effect. *See* H. R. Rep. No. 1214, 69th Cong., 1st Sess. 4 (1926) (the purpose of the suspension period "is to prevent the new rate from becoming effective until the question of its justness and reasonableness can be determined"). The seven month suspension period created by the Newton amendment in 1927 now appears in §10708(b). *See Arrow*, 372 U.S. at 665 ("The suspension provisions took their present form, vesting authority in the Commission to suspend for a maximum period of seven months, in the Act of 1927").

In *Arrow*, rail carriers filed and published new rates that went into effect after the suspension period. A competing carrier and others requested a federal district court to enjoin the rail carriers from enforcing their new rates. The district court found that the new rates might well cause irreparable

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[13] Another portion of the Newton amendment confirms the conclusion that Representative Newton sought to facilitate compliance with the filed rate doctrine, not to sow the seeds of its destruction by the ICC. The Newton amendment amended the filed rate doctrine to provide that an agent-consignee of a shipper could avoid liability for filed rate claims, but, in that event, the consignor/shipper would remain liable for such claims. 44 Stat. 1447. *See* H.R. Rep. No. 1214, 69th Cong., 1st Sess. 3 (1926) ("To avoid any possibility of this [limitation on the consignee's liability] being used for rebating or discrimination by the carrier as between shippers, the amendment makes the consignor liable in those instances for the additional charges"). This limited, specific exception to the filed rate doctrine now appears in 49 U.S.C. §10744.

injury to the plaintiffs. *Arrow*, 372 U.S. at 660-61. The district court nevertheless declined to enjoin the new rates, and explained that Congress had vested in the ICC the exclusive power to suspend rates. *Id.* at 661-62. This Court affirmed. The Court traced the development of the ICC's statutory suspension power through the 1927 Newton amendment. *Id.* at 662-67. From this history, the Court determined that Congress vested the suspension power in the ICC (*see* §10708) to abolish the "diverse results" and "competitive inequities" caused by federal court injunctions against enforcement of filed tariff rates. *Arrow*, 372 U.S. at 663. The Court ruled:

> We cannot believe that Congress would have given such detailed consideration to the period of suspension unless it meant thereby to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief. (*Arrow*, 372 U.S. at 667.)

The ICC overlooks the foregoing history of the Act in arguing that §11702(a)(4) should be construed to permit a federal district court to enjoin enforcement of a filed tariff rate that the ICC has neither suspended, rejected, nor cancelled. The ICC's view of its right to enforce its credit regulations through a federal court injunction under §11702(a)(4) would revive the federal equity practice that *Arrow* holds the Act abolished during the 1920's.

The ICC cannot effectively distinguish *Arrow* by arguing that it involved a request for injunctive relief by private parties, instead of the ICC. The structure of the Act is not susceptible to that distinction. Currently, as in 1927, the Act limits the ICC's suspension power to seven months. *See* 49 U.S.C. §10708; *Arrow*, 372 U.S. at 665-66. It would do violence to that statutory structure to interpret it to mean that: (1) the ICC's suspension power is limited to seven months, but (2) after seven months, the ICC may obtain a non-statutory increase of the suspension period by getting a federal court to enjoin enforcement of the rate, even though the

ICC has neither before nor after the suspension period suspended, rejected, or cancelled the rate. As *Arrow* notes, Congress limited the suspension period because the "carriers contended that any postponement of rate changes would result in loss of revenue or competitive advantages fairly due them in the interim if the rates were finally determined to be lawful." *Arrow*, 372 U.S. at 664-65. Congress made this decision with full knowledge that "some shippers might for a time have to pay unlawful rates because a [suspension] proceeding might not be concluded and an order made within the reduced time." *Id.* at 665.[14]

The legislative history of the exception clause of §11702(a)(4) reinforces the conclusion that the Act deprives courts of the power to enjoin rates that the ICC has failed to suspend, reject, or cancel. That exception clause formerly appeared in §222(b) of the Motor Carrier Act of 1935, 49 Stat. 543, 564. Shortly after the enactment of this provision, a district court ruled that it had jurisdiction to compel a carrier to adhere to its filed rate, but that the exception clause deprived the court of power "to determine a complaint that the rates, fares or charges established by a motor carrier were unreasonable or were discriminatory." *ICC v. Overnight Motor Transp.*, 24 F. Supp. 751, 752 (E.D. Pa. 1938). Further, a transportation expert commented at the time that, by reason of the exception clause in §222(b), "the discriminatory or unreasonable character of rates, fares or charges would have to be determined and lawful rates, fares or charges prescribed by order [of the ICC] before the matter would come within the jurisdiction of the courts." *Mohundro's Notes on Motor Carrier Act, 1935* 389 (C.B. Guthrie Tariff Bureau, Inc., 1935). In contrast, here the ICC seeks an injunction that forces a carrier to *depart* from its duly filed rate even though

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[14] After a carrier's rate takes effect, shippers may obtain reparations under §11705(b)(3) if the ICC thereafter determines the tariff rate to be unlawful (*Reiter*, 122 L.Ed.2d at 616). The ICC, not a court, must make that determination. *See id.*

the ICC admits that: "We don't contend the tariff violated anything." Resp. App. 2a.

VI. *COMMERCIAL METALS* DOES NOT SUPPORT THE ICC'S VIEW THAT THE GENERAL PROVISIONS OF §§10743(b) AND 11702(a)(4) CREATE EXCEPTIONS TO THE "UTTERLY CENTRAL" FILED RATE DOCTRINE OF §§10761-62

The ICC argues that *Commercial Metals*, which this Court decided prior to *Maislin*, supports the ICC's right to an injunction that would prevent the Trustee from enforcing Transcon's loss-of-discount tariff provision. But the Seventh Circuit precedent that the Court cited in *Commercial Metals*, and the Court's reasoning in that case, compel the opposite conclusion. Instead, *Commercial Metals* shows the primacy of the filed rate requirements of §§10761-62 over the credit regulations.

A. *Commercial Metal*'s Reasoning Conflicts with the ICC's Position That the Filed Rate Doctrine Is Subordinate to the ICC's Power To Regulate Credit and To Obtain Injunctions

Although the ICC relies upon *Commercial Metals*, that case did not involve any attempt by the ICC to enforce its credit regulations in a manner that contravened §§10761-62. The ICC was not a party and had not issued its 1988 decision that authorized loss-of-discount tariffs. The parties were a carrier and a shipper. The shipper sought to assert the carrier's violation of the ICC's credit regulations as a defense to enforcement of the carrier's filed rate claim. In rejecting the shipper's defense, the Court stated that a "carrier has not only the right but also the *duty* to recover its proper charges" under the Court's filed rate doctrine precedent. 456 U.S. at 343 (emphasis added). The Court reaffirmed the primacy of the filed rate doctrine:

> We therefore hold that the Court of Appeals erred by permitting [the shipper] to assert an affirmative defense against [the carrier] based on its violation

> of the ICC credit regulations. Such 'equities' as may exist by virtue of the carrier's delay and its violation of the credit regulations are insufficient in magnitude to overcome the time-honored rule that under such circumstances, no "act or omission of the carrier (except the running of the statute of limitations) [will] estop or preclude it from enforcing payment of the full amount by a person liable therefor." *Louisville & Nashville R. Co. v. Central Iron & Coal Co.*, 265 U.S. at 65[.]

Commercial Metals, 456 U.S. at 352. This ruling implicitly holds that a carrier's violation of the ICC's credit regulations does *not* operate to suspend, reject, or cancel the carrier's filed rate. By implicitly finding that the carrier's filed rate remains in effect despite the carrier's violations of the credit regulations, and by affirming the carrier's duty to collect its filed rate notwithstanding any violation of the credit regulations, *Commercial Metals* fails to support the view that a carrier that violates the ICC's credit regulations no longer has either the right or duty to enforce the filed rate.

B. The Seventh Circuit Precedent Cited in *Commercial Metals* Shows That the Injunction Sought by the ICC against the Trustee Is Inconsistent with the Court's Decision

Commercial Metals cites a Seventh Circuit case to illustrate the Court's statement that the ICC has the power to bring an injunction to enforce its credit regulations. The Seventh Circuit case cited by the Court is *ICC v. All-American, Inc.*, 505 F.2d 1360 (7th Cir. 1974). *See Commercial Metals*, 456 U.S. at 349. The injunction in *All-American* is very different from the injunction that the ICC seeks against the Trustee. Here is *All-American's* description of the injunction sought by the ICC:

> This action was instituted in the district court by the appellant Interstate Commerce Commission . . . seeking to enjoin appellee All-American . . . from extending credit to shippers who it knows, or should

> know, *will not pay its tariff charges* within a seven day period from the date of presentation of the freight bill in violation of [the Act] and [the ICC's credit regulations.] The Commission further sought to prevent All-American from providing credit until it had taken precautions *sufficient to assure payment of its tariff charges* within such seven day period as required by the [credit regulations].

All-American, 505 F.2d at 1361-62 (emphasis added). This quotation describes the kind of injunction that the Court intended to approve in *Commercial Metals*: an injunction that compels the carrier to comply with its filed rate and the duty to collect tariff charges, not an injunction that prevents collection of the filed rate. In contrast to *All-American*, the ICC here seeks an injunction to prevent the Trustee from collecting Transcon's filed rate. The ICC admitted this to the district court. *See supra* part I.A, pp. 16-17.

VII. THE ICC'S ARGUMENT THAT IT "COULD" STRIKE TRANSCON'S TARIFF IS BOTH IRRELEVANT AND MISTAKEN

The ICC suggests in a footnote that the ICC's credit regulations can be used to prevent enforcement of Transcon's duly filed rate because the "ICC could strike the tariff from its files (and could, in certain circumstances, retroactively reject it)[.]" Govt. Brief 25 n.20.

This argument assumes that Transcon's loss-of-discount tariff provision is unlawful. But the ICC conceded that the tariff was lawful. *See supra* part I.A, pp. 17-18. Further, it is not a defense to enforcement of a filed tariff rate that the tariff is technically defective or that the rate specified in the tariff is unreasonable. "Under our cases, neither procedural irregularity nor unreasonableness nullifies a filed rate; the shipper's remedy for irregularity or unreasonable rates is damages." *KMart*, 128 L.Ed.2d at 444, *citing Berwind-White Coal Mining Co. v. Chicago & Erie R. Co.*, 235 U.S. 371 (1914), and *Davis v. Portland Seed Co.*, 264 U.S. 403 (1924); *see also KMart*, 128 L.Ed.2d at 444 n.8, *citing Texas &*

Pacific R. Co. v. Cisco Oil Mill, 204 U.S. 449 (1907) (tariff rates filed with ICC and delivered to freight officers of railroad are legally operative despite railroad's failure to post two copies in each railroad depot) and *Genstar Chemical Ltd. v. ICC,* 665 F.2d 1304, 1309 (D.C. Cir. 1981) ("[T]he 'error' in the tariff was certainly not apparent on its face"), *cert. denied,* 456 U.S. 905 (1982).

It is unlikely that the ICC would have taken a three year journey to this Court if it "could" so readily strike Transcon's loss-of-discount tariff provision. In fact, the ICC can not effectively strike Transcon's loss-of-discount tariff. In *ATA*, this Court held that the ICC's power to reject a tariff under §10762(e) does not include the power "to nullify effective tariffs retroactively." *ATA*, 467 U.S. at 361-62. Thus, if the ICC ordered Transcon's loss-of-discount tariff provision cancelled, that cancellation would not retroactively relieve shippers of their liability for the past-due tariff charges that the Trustee seeks to recover for Transcon's past transportation services.

To give shippers blanket relief from the Trustee's enforcement of Transcon's loss-of-discount tariff as applied to past transportation services, the ICC would have to "retroactively reject" that tariff provision under *ATA*, 467 U.S. 354. But, as stated, the ICC concededly has not done so (Govt. Brief 25 n.20), and conceded before the Ninth Circuit that Transcon's loss-of-discount tariff was lawful (Resp. App. 1a-2a). Under *ATA*, retroactive rejection is only justified if it satisfies two criteria: "first, the power must further a specific statutory mandate of the Commission, and second, the exercise of power must be directly and closely tied to that mandate." *ATA*, 467 U.S. at 367. Here, the ICC would be seeking to exercise its narrow retroactive rejection power for the purpose of preventing enforcement of the filed rate doctrine in order to implement the non-specific provisions of §§10743(b) and 11702(a)(4). Yet, as noted *supra* parts IV-V, pp. 26-37, §10743(b) does not allow credit regulations to be used as a device to prevent the collection of the filed rate, and §11702(a)(4) contains a specific exception to the ICC's injunctive powers that prevents their use when the ICC, under

the guise of preventing discrimination, seeks to enjoin the collection of a duly filed and effective rate that has never been suspended, rejected, or cancelled.

As a result, the Trustee is entitled to enforce Transcon's loss-of-discount tariff provision, subject only to the shipper's right to challenge the reasonableness of Transcon's filed rate at the ICC. However, before the ICC can rule on the reasonableness of Transcon's filed rate (1) a shipper must assert a claim (or counterclaim) in a civil action for reparations under §11705(b)(3), and (2) the court must stay and "refer" the reparations claim to the ICC to allow the ICC to determine the reasonableness of the rate and, if the ICC finds the rate to be unreasonable, to set the reasonable rate from which the court awards the shipper damages. *See ATA*, 467 U.S. at 361 n.5; *Reiter*, 122 L.Ed.2d at 618; *KMart*, 128 L.Ed.2d at 444.

VIII. THE ICC'S BROAD READING OF FOOTNOTE 11 OF *MAISLIN* IS MISTAKEN

The ICC concludes its brief by characterizing its injunctive action as within the scope of footnote 11 of *Maislin*. Govt. Brief 26-27. In footnote 11, the Court stated that:

> None of our cases involving a determination by the ICC that the carrier engaged in an unreasonable practice have required departure from the filed tariff schedule altogether; instead, they have required merely the application of a different filed tariff. . . . (*Maislin*, 497 U.S. at 129 n.11.)

Citing footnote 11, the ICC insists that the injunction sought by the ICC complies with the filed rate doctrine in that the injunction would merely require the Trustee to adhere to Transcon's filed discount rate, and would not require the Trustee to depart altogether from Transcon's filed tariff rate.

The ICC's broad reading of footnote 11 contradicts the ICC's own interpretation of the filed rate doctrine when, in 1988, the ICC first specifically authorized loss-of-discount tariffs. *See Ex Parte No. MC-1: Regulations for Payment of Rates and Charges – Penalty Charges for Nonpayment*, 4

I.C.C.2d 340 (1988). As previously noted *supra* part I.A, pp. 15-16, the ICC has stated:

> Under a tariff-rule method of recoupment, at the expiration of the grace period, a carrier *must* affirmatively seek the collection-charge damages due it as provided in the tariff. A carrier has no discretion after the charges become due to waive them or any portion of them. To do so would violate the "filed rate" doctrine applicable to its tariff and unjustly discriminate between other shippers and/or consignees who do not have such fees waived. (*Id.* at 346-47 (emphasis in original).)

There are additional flaws in the ICC's reading of footnote 11. In effect, the ICC argues that the filed rate doctrine permits the ICC to adopt regulations that require a carrier to adhere to an inapplicable tariff as a penalty for violating the ICC's credit regulations. This argument conflicts with the position that the ICC took before the district court, namely that the loss-of-discount tariff provision was a part of Transcon's filed rate within the meaning of *Maislin*. *See supra* part I.A, pp. 16-17.

The ICC's argument leads to absurd results. It would, for example, permit the ICC to adopt a regulation that provides that carriers seeking to recover undercharges shall be limited to the originally billed charges so long as those charges are the same as some otherwise inapplicable, but filed, tariff rate (e.g., a billed rate for a truckload of steel girders would be acceptable if it happened to be the same as the carrier's filed rate for a truckload of feathers). Under the ICC's logic, that regulation would be valid since it would not require a departure "altogether" from the carrier's filed rate. However, this Court has never held that a carrier complies with the filed rate doctrine when it enforces an inapplicable tariff rate. In this case, the ICC *conceded* that Transcon's loss-of-discount tariff provision was a part of Transcon's "filed rate" within the meaning of *Maislin*. Pet. App. 30a, 57a-58a; *see supra* part I.A, pp. 16-18. Further, the loss-of-discount tariff provision unambiguously provides that discount rates apply "only" to

shippers that pay "tariff charges" within 90 days of the shipment. Pet. App. 18a; *see supra* part B, pp. 5-6. The possibilities of discrimination and favoritism would be enormous if the filed rate doctrine permitted the carrier to give discount rates that are conditioned on payment within 90 days to favored customers that pay after 90 days.[15]

Further, none of the cases cited in footnote 11 of *Maislin*, when read in light of that decision, permit the ICC to compel a carrier to adhere to an inapplicable tariff:

1. In *Adams v. Mills*, 286 U.S. 397 (1932), this Court upheld an ICC order that reparations be paid to shippers who were improperly charged a 25 cent fee by various railroads for the unloading of livestock from rail cars. The 25 cent fee was not contained in the railroad's tariff, but was contained in a terminal agent's tariff that had been filed at the ICC, but not "joined in" by the railroads. The ICC had found that the transportation service provided by the railroads included "all services performed in connection with the shipment up to and including the placing of the stock in the pens of the commissionmen." 286 U.S. at 413-14. Since the fee was not part of the railroads' filed tariffs and their filed tariffs included all charges for the unloading of the livestock, the ICC found that it was an unreasonable practice for the railroads to pass through to the shippers the charges of the railroads' agents who actually performed the unloading. In contrast to *Adams*, here Transcon's filed rate unquestionably included the loss-of-discount tariff provision for shippers who paid after 90

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[15] For this reason, there is no merit to the argument of *amici* Health and Personal Care etc., et al. at page 13 of their brief that this case is "akin to the double-payment cases that this Court recognized in *Commercial Metals* as an exception to the [filed rate doctrine]." In the "double-payment" cases, the consignee pays the full filed rate, but pays it to the wrong person. *See Commercial Metals*, 456 U.S. at 347. Here, the Trustee seeks to collect filed rate charges from shippers who clearly failed to pay in full the only applicable filed rate, *i.e.*, the rate that applied to shippers that paid more than 90 days late.

days. There is no attempt to collect a rate in addition to Transcon's filed rate.

2. In *Hewitt-Robbins v. Eastern Freight-Ways*, 371 U.S. 84 (1962), this Court held that a shipper had a common law right to require that a carrier transport its freight over the cheapest available route absent justification for not so doing. The Court did not permit the shipper to disregard or to depart from the tariff rate for the more expensive route, but merely permitted the shipper to assert an independent claim for damages against the carrier for misrouting the shipment in breach of its duties as a common carrier. *Hewitt-Robbins* found that the dispute "is not one of rates but of routes[,]" 371 U.S. at 87, and that the "savings" clause of the Act allowed the common law rights and remedies to survive. In contrast, here the ICC impermissibly attempts to enjoin application of the duly filed and applicable rate without setting aside or suspending that rate as unreasonable.

3. The other cases cited in footnote 11 of *Maislin* consist of circuit court and ICC precedent "in which the ICC has determined that a carrier engaged in an unreasonable practice by requiring a certain notation attached to the bill of lading to qualify the shipper for a reduced tariff . . . . " *Maislin*, 497 U.S. at 129 n.11; *see Carriers Traffic Service, Inc. v. Anderson, Clayton & Co.*, 881 F.2d 475 (7th Cir. 1989); *Standard Brands, Inc. v. Central R. Co. of New Jersey*, 350 I.C.C. 555 (1974). These cases have dubious merit because they were all decided prior to *Maislin*. Further, in reviewing the ICC's pre-*Maislin* practice of selectively ignoring portions of tariffs, the circuit court in *Carriers Traffic* noted that: (1) all of the cases before the circuit court had been referred by the district court to the ICC for its review (881 F.2d at 476-78), and (2) the ICC did *not* excuse compliance with the carrier's filed tariff rate on the ground that "we've always ignored that tariff requirement," (881 F.2d at 484-85), but because the shippers had in fact done everything, other than put a notation on a bill of lading, required to entitle the shipper to the tariff rate (*id.*). In contrast, here there is no allegation that shippers substantially fulfilled the condition precedent to obtaining the

discount (i.e., paying the tariff charge within 90 days). Moreover, the ICC has no general power to award reparations unless the shipper first obtains referral of the issue to the ICC from a district court. *See Reiter*, 122 L.Ed.2d at 618, *citing Ex Parte No. 249 (Sub-No. 1): Informal Procedure for Determining Motor Carrier and Freight Forwarder Reparation*, 335 I.C.C. 403 (1969). Under *Ex Parte No. 249* as approved in *Reiter*, the ICC has no right to enjoin collection of undercharge claims that have never been referred to the ICC.

IX. THE ICC RETAINS BROAD POWER TO REGULATE CREDIT

The Ninth Circuit correctly described as "overblown" the ICC's argument that the circuit court opinion cripples the ICC's enforcement powers. Pet. App. 7a.

Sustaining the Trustee's position will not deprive the ICC of significant enforcement power. The Trustee does not dispute that the ICC has authority to regulate credit under §10743(b) and to obtain injunctions under §11702(a)(4). The ICC remains free to promulgate and enforce any regulatory scheme within reason, so long as it does not operate to preclude a carrier from enforcing its duly filed and effective filed rate. The ICC could even enjoin carriers prospectively to refrain from extending credit to shippers without reminding them of their liability for loss-of-discount tariff charges, and the ICC could further obtain injunctions directing carriers to vigorously enforce their loss-of-discount provisions. *See, e.g., Ex Parte No. 73: Regulations for Payment of Rates and Charges*, 326 ICC 483, 490 (1966) ("we do have the power to prohibit carriers from extending credit to shippers who owe past due charges"). What the ICC cannot do is promulgate or enforce credit regulations that prevent carriers from collecting their duly filed and effective tariff rate.

The ICC also retains the power under *Reiter*, upon referral from the district court, to determine reparations under §11705(b)(3) to the extent that a carrier's loss-of-discount provision is unlawful. Further, under §10704(f), the ICC could begin a proceeding to prospectively cancel under

§10704(b)(2) all loss-of-discount tariffs and to prescribe the new rule to be followed. *See ATA*, 467 U.S. at 360 (under §10704(b)(1), ICC may set the rate to "apply in the future").

The ICC mentions its "lack[ ] of resources" to police tariff filings. Govt. Brief 25 n.20. Congress, not the Court, must solve any funding problem that the ICC may have. In any event, lack of funds does not permit an agency to violate its statutory mandate. Further, the ICC's problems in policing tariffs are at least partly self-inflicted. Even though an underlying policy of the filed rate doctrine is "stabilizing rates," *Maislin*, 497 U.S. at 126, and even though §10708(b) permits the ICC to suspend tariff filings for up to seven months (as a result of the 1927 Newton amendment (*see supra* part V.B, pp. 34-37)), the ICC since 1984 has maintained a policy that permits tariff filings to take effect on one day's notice. *Ex Parte No. MC-170: Short Notice Effectiveness for Independently Filed Motor Carrier and Freight Forwarder Rates*, 1 I.C.C.2d 146 (1984). In adopting this policy, the ICC rejected the argument that "any substantial reduction in notice requirements will effectively eliminate the ability to protest tariff filings." *Id.* at 151-58. *See Maislin*, 497 U.S. at 134 n.14 (listing the ICC's various tariff policies).

X. THE TRUSTEE HAS STANDING TO CHALLENGE THE ICC'S CREDIT REGULATIONS

The Court should reject any argument that the Trustee lacks standing to challenge the ICC's credit regulations. The ICC has previously lost the argument that regulations adopted by it cannot be later challenged. The ICC lost that argument in *State of Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985). There, the Fifth Circuit held:

> When an agency applies a previously adopted rule in a particular case, the Hobbs Act sixty-day limit does not bar later judicial review of the substantive statutory authority for their enactment or of their applicability to a particular situation.

Id. at 1146; *see Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959)

(allowing an attack on FCC rules three years after their promulgation).

Further, even in actions by the Government to obtain a statutory injunction, the "grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." *Id.* The ICC should not be permitted to invoke the equitable jurisdiction of this Court to enforce credit regulations that violate the Act.

XI. THE ICC CONCEDES THAT THE NEGOTIATED RATES ACT OF 1993 DOES NOT ADDRESS THE ISSUE PRESENTED BY THE PETITION

The ICC's certiorari petition concedes that: "The Negotiated Rates Act, however, does not address the issue in this case[.]" Pet. 18 n.12. Under Rule 24.1 of this Court, the ICC is foreclosed from now taking a different position, especially when its opening brief on the merits did not do so.[16]

The ICC declined to present this issue for review, because the Negotiated Rates Act of 1993 did not amend §§10743(b) and 11702(a)(4). Instead, the legislative history of the 1993 amendments reflects that the ICC tried, but failed, to get Congress to amend §10743(b) to say what the ICC insists that provision already says. During the hearings on the proposed 1993 amendments, the Chair of the ICC unsuccessfully urged Congress to amend §10743(b) to read as follows:

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[16] The Trustee has litigation pending that challenges the scope and effect of the Negotiated Rates Act of 1993, and the Government is a participant as *amicus* in that litigation. *See In re Transcon Lines*, 9th Cir. No. 94-55425. The Trustee has not briefed here the issues raised in that litigation. As stated, by reason of the Government's concession in its certiorari petition, those issues are not before this Court at this time.

> . . . . The regulations of the Commission may provide for weekly or monthly payment for transportation provided by motor common carriers and for periodic payment for transportation provided by water common carriers, *and may prescribe permissible terms and conditions for late payment provisions which carriers may apply only if they adhere to those terms and conditions notwithstanding any contrary or conflicting provisions which may be contained in the carrier's tariffs on file with the Commission.*

Hearing on Negotiated Rates Issue and Proposed Legislative Solutions Thereto before the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation, 103rd Cong., 1st Sess. 353-54 (1993) (statement of ICC Chair Gail McDonald) (emphasis in original).

The limited, specific exceptions to the filed rate doctrine made by the 1993 amendments reinforce the wisdom of the Court's view that Congress must use specific language to create an exception to the filed rate doctrine of §§10761-62. As stated, the 1993 amendments did not amend §§10743(b) and 11702(a)(4).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX OF STATUTORY PROVISIONS

Text of the Newton Amendment §§ 1-2, Pub.L.No. 69-804, 69th Cong., 2d. Sess., 44 Stat. 1446 (1927)

CHAP. 510. – An Act To amend the Interstate Commerce Act and the Transportation Act, 1920, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph (1) of section 22 of the Interstate Commerce Act, as amended be amended by adding at the end thereof the following new sentence; "Nothing in this Act shall prevent any carrier or carriers subject to this Act from giving reduced rates for the transportation of property to or from any section of the country with the object of providing relief in case of earthquake, flood, fire, famine, drought, epidemic, pestilence, or other calamitous visitation or disaster, if such reduced rates have first been authorized by order of the commission (with or without a hearing); but in any such order the commission shall define such section and shall specify the period during which such reduced rates are to remain in effect."

That paragraph (2) of section 3 of the Interstate Commerce Act, as amended, is amended to read as follows:

"(2) No carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination: *Provided*, That the provisions of this paragraph shall not be

construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia. Where carriers by railroad are instructed by a shipper or consignor to deliver property transported by such carriers to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of such property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in the property, and (b) prior to delivery of the property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of the property. In such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges, irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made. An action for the enforcement of such liability may be begun within the period provided in paragraph (3) of section 16 or before the expiration of six months after final judgment against the carrier in an action against the consignee begun within

the period provided in paragraph (3) of section 16. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges, notwithstanding the foregoing provisions of this paragraph. An action for the enforcement of such liability may be begun within the period provided in paragraph (3) of section 16 or before the expiration of six months after final judgment against the carrier in an action against the beneficial owner named by the consignee begun within the period provided in paragraph (3) of section 16."

SEC. 2. Paragraph (7) of section 15 of the Interstate Commerce Act, as amended, is amended to read as follows:

"(7) Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, as once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a

longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

* * *

Title 49, United States Code

§ 10704. Authority and criteria: rates, classifications, rules, and practices prescribed by Interstate Commerce Commission

* * *

(b)(1) When the Commission decides that a rate charged or collected by –

(A) a motor common carrier for providing transportation subject to its jurisdiction under subchapter II of chapter 105 of this title by itself, with another motor common carrier, with a rail, express, or water common carrier, or any of them;

(B) a water common carrier for providing transportation subject to its jurisdiction under subchapter III of chapter 105 of this title; or

(C) a freight forwarder for providing service subject to its jurisdiction under subchapter IV of chapter 105 of this title;

or that a classification, rule, or practice of that carrier, does or will violate this chapter, the Commission shall prescribe the rate (including a maximum or minimum rate, or both), classification, rule, or practice to be followed.

(2)(A) When prescribing a rate, classification, rule, or practice for transportation or service by common carriers other than by rail carrier, the Commission shall consider, among other factors, the effect of the prescribed rate, classification, rule, or practice on the movement of traffic by that carrier.

(B) When prescribing a rate, classification, rule, or practice for transportation or service by common carriers other than by rail carrier or motor carrier of property, the Commission shall consider, among other factors, the need for revenues that are sufficient, under honest, economical, and efficient management, to let the carrier provide that transportation or service.

* * *

(f) The Commission may begin a proceeding under this section on its own initiative or on complaint. A complaint under subsection (a) of this section must be made under section 11701 of this title, but the proceeding may also be in extension of a complaint pending before the Commission. A complaint under subsection (c) of this section must contain a full statement of the facts and the reasons for the complaint and must be made under oath.

§ 10708. Investigation and suspension of new nonrail carrier rates, classifications, rules, and practices

(a)(1) The Interstate Commerce Commission may begin a proceeding to determine the lawfulness of a proposed rate, classification, rule, or practice immediately, on its own initiative or on application of an interested party when –

(A) a new individual or joint rate or individual or joint classification, rule, or practice affecting a rate is filed with the Commission by a common carrier, other than a rail carrier, under this subtitle; or

(B) a new or reduced rate or rule or practice that causes a reduction of a rate is filed with the Commission by a contract carrier under this subtitle.

(2) The Commission must give reasonable notice before beginning a proceeding under this section but may act without allowing an interested carrier to file an answer or other formal pleading in response to its decision to begin the proceeding. The Commission may take whatever final action on a rate, classification, rule, or practice under this section, after a full hearing (whether completed before or after the rate, classification, rule, or practices goes into effect), as it could in a proceeding begun after a rate, classification, rule, or practice became effective.

(c) Pending final Commission action in a proceeding under subsection (a) of this section, the Commission may suspend the proposed rate, classification, rule, or practice at any time for not more than 7 months beyond the time it would otherwise go into effect by (1) delivering to each affected carrier, and (2) filing with the proposed rate, classification, rule, or practice, a statement of reasons for the suspension. If the Commission does not take final action during the suspension period, the proposed rate, classification, rule, or practice is effective at the end of that period. However, if an increase in a rate for, or related to, transportation of property by an express, sleeping car, or pipeline carrier becomes effective under this subsection, the Commission may require the interested carrier to account for all amounts received under it and specify by whom and on whose behalf those amounts were paid. When the Commission takes final

action, it may require the carrier to refund, with interest, to the persons on whose behalf those amounts were paid, the part of the increased rate found to be in violation of this subtitle.

(c) In a proceeding under this section, the burden is on the carrier proposing the changed rate, classification, rule, or practice to prove that the change is reasonable. The Commission shall give proceedings under this section preference over all other proceedings related to that type of carrier pending before it and make its decision at the earliest practical time. . . .

§ 10743. Payment of rates

(a) Except as provided in subsection (b) of this section, a common carrier (except a pipeline or sleeping car carrier) providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under this subtitle shall give up possession at destination of property transported by it only when payment for the transportation or service is made.

(b)(1) Under regulations of the Commission governing the payment for transportation and service and preventing discrimination, those carriers may give up possession at destination of property transported by them before payment for the transportation or service. The regulations of the Commission may provide for weekly or monthly payment for transportation provided by motor common carriers and for periodic payment for transportation provided by water common carriers.

(2) Such a carrier (including a motor common carrier being used by a household goods freight forwarder) may extend credit for transporting property for the United States Government, a State, a territory or possession of the United States, or a political subdivision of any of them.

§ 10744. Liability for payment of rates

(a)(1) Liability for payment of rates for transportation for a shipment of property by a shipper or consignor to a consignee other than the shipper or consignor, is determined under this subsection when the transportation is provided by a rail, motor, or water common carrier under this subtitle. When the shipper or consignor instructs the carrier transporting the property to deliver it to a consignee that is an agent only, not having beneficial title to the property, the consignee is liable for rates billed at the time of delivery for which the consignee is otherwise liable, but not for additional rates that may be found to be due after delivery if the consignee gives written notice to the delivering carrier before delivery of the property –

(A) of the agency and absence of beneficial title; and

(B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.

(2) When the consignee is liable only for rates billed at the time of delivery under paragraph (1) of this subsection, the shipper or consignor, or, if the property is reconsigned or diverted, the beneficial owner, is liable for those additional rates regardless of the bill of the lading or contract under which the property was transported. The beneficial owner is liable for all rates when the property is reconsigned or diverted by an agent but is refused or abandoned at its ultimate destination if the agent gave the carrier in the reconsignment or diversion order a notice of agency and the name and address of the beneficial owner. A consignee giving the carrier, and a reconsignor or diverter giving a rail carrier, erroneous information about the identity of the beneficial owner of the property is liable for the additional rates. . . .

§ 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device. . . .

§ 10762. General tariff requirements

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year or a motor carrier of property providing transportation under a certificate to which the provisions of section 10922(b)(4)(E) of this title apply or under a permit to which the provisions of section 10923(b)(5) of this title apply may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

(2) Carriers that publish tariffs under paragraph (1) of this subsection shall keep them open for public inspection. A rate contained in a tariff filed by a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of chapter 105 shall be stated in money of the United States. A tariff filed by a motor or water contract carrier or by a

household goods freight forwarder providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of that chapter, respectively, may not become effective for 30 days after it is filed.

(b)(1) The Commission shall prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection under this section. The Commission may prescribe specific charges to be identified in a tariff published by a common carrier providing transportation or service subject to its jurisdiction under subchapter I, III, or IV of that chapter, but those tariffs must identify plainly –

(A) the places between which property and passengers will be transported;

(B) terminal, storage, and icing charges (stated separately) if a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter;

(C) terminal charges if a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter III or IV of that chapter;

(D) privileges given and facilities allowed; and

(E) any rules that change, affect, or determine any part of the published rate.

(2) A joint tariff filed by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter shall identify the carriers that are parties to it. The carriers that are parties

to a joint tariff, other than the carrier filing it, must file a concurrence or acceptance of the tariff with the Commission but are not required to file a copy of the tariff. The Commission may prescribe or approve what constitutes a concurrence or acceptance.

(c)(1) When a common carrier providing transportation or service subject to the jurisdiction of the Commission (A) under subchapter I of chapter 105 of this title proposes to change a rate, or (B) under another subchapter of that chapter proposes to change a rate, classification, rule, or practice, the carrier shall publish, file, and keep open for public inspection a notice of the proposed change as required under subsections (a) and (b) of this section.

(2) When a contract carrier providing transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title proposes to establish a new rate or to reduce a rate, directly or by changing a rule or practice related to the rate or the value of service under the rate, the carrier shall publish, file, and keep open for public inspection a notice of the new or reduced rate as required under subsections (a) and (b) of this section.

(3) A notice filed under this subsection shall plainly identify the proposed change or new or reduced rate and indicate its proposed effective date. In the case of a carrier other than a rail carrier and motor common carrier of passengers with respect to special or charter transportation, a proposed rate change or a new or reduced rate may not become effective for 30 days after the notice is

published, filed, and held open as required under subsections (a) and (b) of this section. In the case of a rail carrier, a proposed rate change resulting in an increased rate or a new rate shall not become effective for 20 days after the notice is published and a proposed rate change resulting in a reduced rate shall not become effective for 10 days after the notice is published, except that a contract authorized under section 10713 of this title shall become effective in accordance with the provisions of such section. In the case of a motor common carrier of passengers, a proposed rate change resulting in an increased rate or a new rate applicable to special or charter transportation shall not become effective for 30 days after the notice is published, and a proposed rate change resulting in a reduced rate applicable to special or charter transportation shall not become effective for 10 days after the notice is published.

(d)(1) The Commission may reduce the notice period of subsections (a) and (c) of this section if cause exists. The Commission may change the other requirements of this section if cause exists in particular instances or as they apply to special circumstances.

(2) The Commission may prescribe regulations for the simplification of tariffs by carriers providing transportation subject to its jurisdiction under subchapter I of chapter 105 of this title and permit them to change rates, classifications, rules, and practices without filing complete tariffs that cover matter that is not being changed when the Commission finds that action to be consistent with the public interest. Those carriers may publish new tariffs that incorporate changes or plainly indicate the proposed changes in the tariffs then in effect and kept

open for public inspection. However, the Commission shall require that all rates of rail carriers and rail ratemaking associations be incorporated in their individual tariffs by the end of the 2d year after initial publication of the rate, or by the end of the 2d year after a change in a rate becomes effective, whichever is later. The Commission may extend those periods if cause exists, but if it does, it must send a notice of the extension and a statement of the reasons for the extension to Congress. A rate not incorporated in an individual tariff as required by the Commission is void.

(e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section. . . .

§ 11702. Enforcement by the Interstate Commerce Commission

(a) The Interstate Commerce Commission may bring a civil action –

(1) to enjoin a rail carrier from violating section 10901-10907 or 10933 of this title, or a regulation prescribed or certificate issued under any of those sections;

(2) to enforce section 10527 or 10930 or 11109 or 11111 or 11323 of this title, or subchapter III of chapter 113 of this title and to compel compliance with the order of the Commission under any of those sections and that subchapter;

(3) to enforce an order of the Commission, except a civil action to enforce an order for the payment of money,

when it is violated by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title;

(4) to enforce this subtitle (except a civil action under a provision of this subtitle governing the reasonableness and discriminatory character of rates), or a regulation or order of the Commission or a certificate or permit issued under this subtitle when violated by a motor carrier or broker providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title or by a foreign motor carrier or foreign motor private carrier providing transportation under a certificate of registration issued under section 10530 of this title;

(5) to enforce this subtitle (except a civil action under a provision of this subtitle governing the reasonableness and discriminatory character of rates), or a regulation or order of the Commission or a certificate or permit issued under this subtitle, except a civil action to enforce an order for the payment of money, when violated by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter III of chapter 105 of this title; and

(6) to enforce this subtitle, or a regulation or order of the Commission or permit issued under this subtitle when violated by a carrier providing service subject to the jurisdiction of the Commission under subchapter IV of chapter 105 of this title. . . .

§ 11706. Limitation on actions by and against common carriers

(a) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title or a freight forwarder must begin a civil action to recover charges for transportation or service provided by the carrier or freight forwarder within 3 years after the claim accrues; except that a motor carrier (other than a motor carrier providing transportation of household goods) or freight forwarder (other than a household goods freight forwarder)–

(1) must begin such a civil action within 2 years after the claim accrues if the transportation or service is provided by the carrier in the 1-year period beginning on the date of the enactment of the Negotiated Rates Act of 1993; and

(2) must begin such a civil action within 18 months after the claim accrues if the transportation or service is provided by the carrier after the last day of such 1-year period. . . .

§ 11902. Civil penalty for accepting rebates from common carrier

A person (1) delivering property to a common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title for transportation under this subtitle or for whom that carrier will transport the property as consignor or consignee for that person from a State or

territory or possession of the United States to another State or possession, territory, or to a foreign country, and (2) knowingly accepting or receiving by any means a rebate or offset against the rate for transportation for, or service of, that property contained in a tariff filed with the Commission under subchapter IV of chapter 107 of this title, is liable to the United States Government for a civil penalty in an amount equal to 3 times the amount of money that person accepted or received as a rebate or offset and 3 times the value of other consideration accepted or received as a rebate or offset. In a civil action under this section, all money or other consideration received by the person during a period of 6 years before an action is brought under this section may be included in determining the amount of the penalty, and if that total amount is included, the penalty shall be 3 times that total amount.

§ 11903. Rate, discrimination, and tariff violations

(a) A person that knowingly offers, grants, gives, solicits, accepts, or receives by any means transportation or service provided for property by a common carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (1) at less than the rate in effect under chapter 107 of this title, or (2) by practicing discrimination, shall be fined at least $1,000 but not more than $20,000, imprisoned for not more than 2 years, or both.

(b) A carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title or an officer, director, receiver, trustee,

lessee, agent, or employee of a corporation that is subject to the jurisdiction of the Commission under that chapter, that willfully does not file and publish its rates or tariffs as required under chapter 107 of this title or observe those tariffs until changed under law, shall be fined at least $1,000 but not more than $20,000, imprisoned for not more than 2 years, or both.

(c) When acting in the scope of their employment, the actions and omissions of persons acting for or employed by a carrier or shipper that is subject to subsection (a) or (b) of this section are considered to be the actions and omissions of that carrier or shipper as well as that person.

(d) Trial in a criminal action under this section is in the judicial district in which any part of the violation is committed or through which the transportation is conducted.

§ 11916. Conclusiveness of rates in certain prosecutions

When a carrier files with the Interstate Commerce Commission or publishes a particular rate under chapter 107 of this title or participates in one of those rates, the published or filed rate is conclusive proof against that carrier, its officers, and agents that it is the legal rate for that transportation or service in a proceeding begun under section 11902 or 11903 of this title. A departure, or offer to depart, from that rate is a violation of those sections. . . .

* * *

Title 49, Code of Federal Regulations

PART 1320 – REGULATIONS FOR THE PUBLICATION, POSTING AND FILING OF TARIFFS, SCHEDULES AND RELATED DOCUMENTS

Sec.

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AUTHORITY: 49 U.S.C. 10321 and 10762; 5 U.S.C. 553

SOURCE: 49 FR 38615, Oct. 1, 1984, unless otherwise noted.

EFFECTIVE DATE NOTE: At 54 FR 6404, Feb. 10, 1989, part 1312 was removed, effective March 13, 1989. At 54 FR 10533, Mar. 13, 1989, ICC issued a document to stay the effective date of this rule, effective March 10, 1989.

At 54 FR 42959, Oct. 19, 1989, a partial lifting of stay was published, effective November 8, 1989, for rail carriers only. . . .

§ 1312.14 Statement of rates and fares.

(a) *Shall be clear and explicit.* (1) Rates, fares, and provisions shall be clearly stated and arranged in a systematic manner which establishes the rate, charge or

attendant provisions for each service offered or performed by the serving carrier. Rates and charges shall be explicitly stated per unit in U.S. dollars or cents. A rate for a given service may be expressed as a definite percentage of another explicitly stated rate in the same or other tariffs. The disposition of fractions and other tariff elements required to determine the applicable rate, charge or provision shall be clearly explained. Tariffs of motor passenger contract carriers shall provide an explicit statement of the minimum rates, fares, or charges actually maintained. Rates may be stated in any measurable unit. Rates may be stated as applying e.g., per car, per vehicle, per mile, per vehicle-mile, per container, per package, per passenger, per unit of time or other variable unit, provided the measure of the service is fixed by defining the unit specifically, or in maximum terms, such as a stated maximum weight of contents permitted per vehicle or container of a certain maximum cubic capacity or measurement, or stated maximum dimensions or weight per individual package. Rates for rail, water, and motor passenger service (including one-way, roundtrip, commutation, etc.) may be stated per passenger or other identifiable unit. Rates based on quantity shall be stated as having any quantity, less-than-truckload, truckload, less-than-carload, carload, trainload, volume or any other clearly defined quantity application. . . .

[49 FR 38615, Oct. 1, 1984, as amended at 50 FR 459, Jan. 4, 1985]

§ 1312.19 Cancellation of tariff and transfer of provisions.

(a) *Cancellation of an entire tariff.* (1) Except as provided in paragraph (a)(4) of this section, a tariff shall be canceled by issuing a supplement. The supplement shall –

(i) State on its title page that it cancels the tariff;

(ii) Refer by ICC designation to the tariff(s), if any, which applies in place of the canceled provisions; and

(iii) Identify provisions being transferred (not discontinued) and the tariffs to which they are being transferred. . . .

§ 1312.21 Suspended matter.

(a) *Effect of suspension.* When the Commission suspends one or more rate(s), provision(s), or publication(s), that suspended matter is postponed until the suspension period runs out.

(b) *Supplement required.* A supplement announcing the suspension shall be filed to the involved tariff(s). Two methods of publishing may be used. One is to issue a separate supplement for each suspension proceeding; the other is to issue a consolidated suspension supplement which contains notices of all suspension proceedings involving the tariff. Only one consolidated supplement to a tariff may be in effect at one time. The title page of either type of supplement shall –

(1) Identify the Commission's suspension docket number;

(2) Show an issue date but not an effective date; and

(3) Comply with the requirements governing tariff amendments, except as otherwise provided in this section.

(c) *Content of supplement.* The supplement shall:

(1) Identify the rates, provisions or publications which have been suspended;

(2) State that those rates, provisions or publications are "under suspension and may not be used until [here show either the date to which the matter has been suspended, or a later date, or state "this suspension notice is canceled"]";

(3) Identify the rates, provisions or publications that will apply in place of the suspended matter;

(4) Correct by statement any cancellations which would have the effect of canceling the suspended matter or the matter held in force; and

(5) Correct the listing of effective supplements on previous supplements' title pages. . . .

PART 1320 – EXTENSION OF CREDIT TO SHIPPERS BY RAIL COMMON CARRIERS, MOTOR COMMON CARRIERS, WATER COMMON CARRIERS, AND HOUSEHOLD GOODS FREIGHT FORWARDERS

Sec.

§ 1320.1 Scope.

1320.2 Extension of credit to shippers.

1320.3 Presentation of freight bills.

1320.4 Effect of mailing freight bills or payments.

1320.5 Additional charges.

1320.6 Computation of time.

1320.7 Charges under average demurrage agreements.

1320.8 Household goods shipments by motor common carriers.

1320.9-1320.16 [Reserved]

1320.17 Interline settlement of revenues.

AUTHORITY: 5 U.S.C. 553 and 49 U.S.C. 10321, 10701, 10702, 10741, 10743, and 10744.

SOURCE: 50 FR 2290, Jan. 16, 1985, unless otherwise noted.

§ 1320.1 Scope.

(a) *General.* These regulations apply to the extension of credit in the transportation of property under Interstate Commerce Commission regulation by rail, motor,

and water carriers and household goods freight forwarders, except as otherwise provided.

(b) *Exceptions.* These regulations do not apply to –

(1) Contract carriage operations.

(2) Transportation for –

(i) The United States or any department, bureau, or agency thereof,

(ii) Any state, or political subdivision thereof,

(iii) The District of Columbia.

(3) Property transportation incidental to passenger operations.

[50 FR 2290, Jan. 16, 1985, as amended at 51 FR 44297, Dec. 9, 1986]

§ 1320.2 Extension of credit to shippers.

(a) *Authorization to extend credit.* (1) A carrier that meets the requirements in paragraph (a)(2) of this section may –

(i) Relinquish possession of freight in advance of the payment of the tariff charges, and

(ii) Extend credit in the amount of such charges to those who undertake to pay them (such persons are called *shippers* in this part).

(2) For such authorization, the carrier shall take reasonable actions to assure payment of the tariff charges within the credit periods specified –

(i) In this part, or

(ii) In tariff provisions published pursuant to the regulations in paragraph (d) of this section.

(b) *When the credit period begins.* The credit period shall begin on the day following presentation of the freight bill.

(c) *Length of credit period.* Unless a different credit period has been established by tariff publication pursuant to paragraph (d) of this section, the credit period is 15 days. It includes Saturdays, Sundays, and legal holidays.

(d) *Carriers may establish different credit periods in tariff rules.* Carriers may publish tariff rules establishing credit periods different from those in paragraph (c) of this section. Such credit periods shall not be longer than 30 calendar days.

(e) *Service charges.* (1) Service charges shall not apply when credit is extended and payments are made within the standard credit period. The term *standard credit period*, as used in the preceding sentence, means –

(i) The credit period prescribed in paragraph (c) of this section, or

(ii) A substitute credit period published in a tariff rule pursuant to the authorization in paragraph (d) of this section.

(2) Carriers may, by tariff rule, extend credit for an additional time period, subject if they wish to a service charge for that additional time. The combined length of the carrier's standard credit period (as defined in paragraph (e)(1) of this section) and its additional credit

period shall not exceed the 30-day maximum credit period prescribed in paragraph (d) of this section. When such a tariff rule is in effect, shippers may elect to postpone payment until the end of the extended credit period if, in consideration therefor, they include any published service charges when making their payment.

(3) Carriers may, by tariff rule, establish service charges for payments made after the expiration of an authorized credit period. Such a rule shall –

(i) Institute such charges on the day following the last day of an authorized credit period, and

(ii) Notify shippers –

(A) That its only purpose is to prevent a shipper who does not pay on time from having free use of funds due to the carrier;

(B) That it does not sanction payment delays, and

(C) That failure to pay within the authorized credit period will, despite this provision for such charges, continue to require the carrier, before again extending credit, to determine in good faith whether the shipper will comply with the credit regulations in the future.

(4) Tariff rules that establish charges pursuant to paragraph (e)(2) or (3) of this section may establish minimum charges.

(f) *Discounts.* Carriers may, by tariff rule, authorize discounts for early freight bill payments when credit is extended.

(g)(1) *Collection expense charges.* Carriers may, by tariff rule, assess reasonable and certain liquidated damages

for all costs incurred in the collection of overdue freight charges. Carriers may use one of two methods in their tariffs:

(i) The first method is to assess liquidated damages as a separate additional charge to the unpaid freight bill. In doing so, the tariff rule shall disclose the exact amount of the charges by stating either a dollar or specified percentage amount (or a combination of both) of the unpaid freight bill. The tariff shall further specify the time period (which shall at least allow for the authorized credit period) within which the shipper must pay to avoid such liquidated damages.

(ii) The second method is to require payment of the full, nondiscounted rate instead of the discounted rate otherwise applicable. The difference between the discount and the full rate constitutes a carrier's liquidated damages for its collection effort. Under this method the tariff shall identify the discount rates that are subject to the condition precedent and which require the shipper to make payment by a date certain. The date certain may not be set to occur by the carrier until at least after the expiration of the carrier's authorized credit period.

(2) The damages, the timing of their applicability, and the conditions, if any, as provided by the tariff-rule methods allowed under paragraphs (g)(1)(i) and (ii) of this section also:

(i) Shall be clearly described in the tariff rule;

(ii) Shall be applied without unlawful prejudice and/or unjust discrimination between similarly situated shippers and/or consignees;

(iii) Shall be applied only to the non-payment of original, separate and independent freight bills and shall not apply to aggregate *balance-due* claims sought for collection on past shipments by a bankruptcy trustee, or any other person or agent;

(iv) Shall not apply to instances of clear clerical or ministerial error such as non-receipt of a carrier's freight bill, or shipper's payment check lost in the mail, or carrier mailing of the freight bill to the wrong address;

(v) Shall not apply in any way to a charge for a transportation service if the carrier's bill of lading independently provides that the shipper is liable for fees incurred by the carrier in the collection of freight charges on that same transportation service;

(vi) Shall be applied only after the authorized credit period, and when the carrier has issued a revised freight bill or notice of imposition of collection expense charges for late payment within 90 days after expiration of the authorized credit period.

(3) As an alternative to the tariff-rule methods allowed under paragraphs (g)(1)(i) and (ii) of this section, a carrier may, wholly outside of its tariff, assess collection charges though [*sic*] contract terms in a bill of lading. By using the carrier and its bill of lading, the shipper accepts the bill of lading terms.

(h) *Discrimination prohibited.* Tariff rules published pursuant to paragraphs (a), (e), and (f) of this section shall not result in unreasonable discrimination among shippers.

[50 FR 2290, Jan. 16, 1985, as amended at 53 FR 6991, Mar. 4, 1988; 54 FR 30748, July 24, 1989]

§ 1320.3 Presentation of freight bills.

(a) *"To be prepaid" shipments.* (1) On "to be prepaid" shipments, the carrier shall present its freight bill for all transportation charges within the time period prescribed in paragraph (a)(2) of this section, except –

(i) As noted in paragraph (d) of this section, or

(ii) As otherwise excepted in this part.

(2) The time period for a carrier to present its freight bill for all transportation charges shall be 7 days, measured from the date the carrier received the shipment. This time period does not include Saturdays, Sundays, or legal holidays.

(b) *"Collect" shipments.* (1) On "collect" shipments, the carrier shall present its freight bill for all transportation charges within the time period prescribed in paragraph (b)(2) and of this section, except –

(i) As noted in paragraph (d) of this section, or

(ii) As otherwise excepted in this part.

(2) The time period for a carrier to present its freight bill for all transportation charges shall be 7 days, measured from the date the shipment was delivered at its destination. This time period does not include Saturdays, Sundays, or legal holidays.

(c) *Bills or accompanying written notices shall state penalties for late payment, credit time limits and service charge*

and/or collection expense charge and discount terms. When credit is extended, freight bills or a separate written notice accompanying a freight bill or a group of freight bills presented at one time shall state that "failure timely to pay freight charges may be subject to tariff penalties" (or a statement of similar import). The bills or other notice shall also state the time by which payment must be made and any applicable service charge and/or collection expense charge and discount terms.

(d) *When the carrier lacks sufficient information to compute tariff charges.* (1) When information sufficient to enable the carrier to compute the tariff charges is not then available to the carrier at its billing point, the carrier shall present its freight bill for payment within 7 days following the day upon which sufficient information becomes available at the billing point. This time period does not include Saturdays, Sundays, or legal holidays.

(2) A carrier shall not extend further credit to any shipper which fails to furnish sufficient information to allow the carrier to render a freight bill within a reasonable time after the shipment is tendered to the origin carrier.

(3) As used in this paragraph, the term "shipper" includes, but is not limited to, freight forwarders, and shippers' associations and shippers' agents within the meaning of 49 U.S.C. 10562(3) and (4).

(e) *Freight bill presentation on railroad transported export traffic loaded into vessels.* The term *delivered at its destination* as used in paragraph (b)(2) of this section shall mean the time when the vessel is completely loaded, when –

(1) The traffic in export traffic that is loaded into vessels either –

(i) Direct from railroad cars or piers, or

(ii) From such cars or pirers [*sic*] by means of lighters, and

(2) The freight bills are presented to vessel owners or their representatives.

[50 FR 2290, Jan. 16, 1985, as amended at 53 FR 6991, Mar. 4, 1988; 54 FR 30748, July 24, 1989]

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